IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case 1:17-cv-02459-GLR Hon. George L. Russell, III

DEFENDANTS' NOTICE OF FILING PETITION FOR WRIT OF MANDAMUS

The government respectfully notifies the Court that it will shortly file in the U.S. Court of Appeals for the Fourth Circuit a petition for a writ of mandamus to the U.S. District Court for the District of Maryland. Pursuant to Federal Rule of Appellate Procedure 21, the government hereby provides a copy of the petition and addendum to the Honorable George L. Russell, III, and to all parties to this proceeding.

March 1, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, I served the foregoing Defendants' Notice of Filing Petition for Writ of Mandamus using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record. I further certify that I have arranged for a paper copy of this filing to be sent to the Court.

Dated: March 1, 2019

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Petitioners.	No. 2019-_____ D. Ct. No. 1:17-cv-2459-GLR

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

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INTRODUCTION AND SUMMARY

Pursuant to 28 U.S.C. § 1651, the government respectfully requests that this Court direct the district court to stay its nationwide preliminary injunction of November 21, 2017, which threatens to prohibit the military from adopting the Department of Defense's 2018 policy regarding military service by transgender individuals. On January 22, 2019, the Supreme Court stayed two nationwide preliminary injunctions that are materially indistinguishable from the injunction entered here. As a result, the injunction here is the only court order that now impedes the military from proceeding in the manner deemed proper by the Department of Defense.

In light of the Supreme Court's order, the government on January 24, 2019, asked the district court to stay its preliminary injunction and requested that it act on the motion on an expedited basis. Add. 1. Plaintiffs immediately agreed that the injunction should be stayed, except with regard to five individual plaintiffs, and made no attempt to oppose expedited consideration. Despite the Supreme Court's clear guidance and plaintiffs' submission, the district court has not acted on the stay motion in the intervening month.

Exercise of this Court's mandamus powers is plainly warranted. The Supreme Court granted stays of materially indistinguishable injunctions in their entirety, even though it had not yet exercised its certiorari jurisdiction. The government sought those stays in conjunction with petitions for certiorari before judgment. It did not

seek Supreme Court review in this case only because the district court has not yet acted on the government's motion to dissolve the preliminary injunction—a motion that has been pending for nearly a year, thus frustrating the government's ability to appeal from a decision. The combined failure to act on the motion to dissolve and on the motion for a stay makes a writ of mandamus the only means for eliminating the bar to implementation of the military's policy and bringing this case into line with the Supreme Court's rulings. Just as the Supreme Court took action while the related injunctions were still on review in the courts of appeals, so too should this Court exercise its authority to direct the relief that the Supreme Court has deemed necessary.

STATEMENT

A. Factual Background

1. This case concerns the military's policy regarding service by transgender persons. In June 2016, then-Secretary of Defense Ashton Carter, in a shift from longstanding policy, determined that "transgender individuals shall be allowed to serve in the military." Doc. 40-4 at 2. Consistent with the *Diagnostic and Statistical Manual of Mental Disorders*, the Carter policy adopted restrictions based on the medical condition of "gender dysphoria" and medical treatment associated with gender transition. *Id.* attach. at 1. Gender dysphoria involves a "marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration," that is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." Doc. 120-2 at 7

n.10, 20-21. Treatment for gender dysphoria may involve psychotherapy and also include gender transition. *Id.* at 22.

The Carter accession standards—which were scheduled to become effective July 1, 2017—would "disqualify[]" any applicant with a history of gender dysphoria or of medical treatment associated with gender transition, unless the applicant met certain conditions, such as 18 months of stability (*i.e.*, the absence of gender dysphoria) before joining. Doc. 40-4, attach. at 1. The Carter retention standards prohibited the discharge of servicemembers on the basis of transgender status but required servicemembers without a diagnosis of gender dysphoria, like all other servicemembers, to serve in their biological sex. *Id.*; Doc. 120-2 at 8. The Carter policy, however, allowed some individuals who have undergone gender transition to enter the military and serve in their preferred gender; it likewise permitted current servicemembers with gender dysphoria to serve in their preferred gender after completing gender transition. Doc. 120-2 at 14-16; *see also* Doc. 40-4, attach. at 1-2; Doc. 40-10, at 4.

2. On June 30, 2017, then-Secretary of Defense James Mattis concluded, "after consulting with the Service Chiefs and Secretaries," that it was "necessary to defer" the accession standards until January 1, 2018, so that the military could "evaluate more carefully" their effect "on readiness and lethality." Doc. 40-11. Following that announcement, the President stated on Twitter on July 26, 2017, that "the United

States Government will not accept or allow . . . Transgender individuals to serve in any capacity in the U.S. Military." Doc. 40-22.

In August 2017, the President issued a memorandum directing the military to "return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have . . . negative effects" on the military. Doc. 40-21 at 1-2. The President directed then-Secretary Mattis to submit "a plan for implementing" the policy that existed before the Carter policy, while emphasizing that the Secretary could instead "advise [him] at any time, in writing, that a change to [such] policy is warranted." *Id.* at 2.

3. Then-Secretary Mattis established a panel of experts to "conduct an independent multi-disciplinary review and study," which resulted in recommendations that flowed from the panel's exercise of "its professional military judgment." Doc. 120-2 at 17-18. In February 2018, then-Secretary Mattis sent the President a memorandum proposing a policy consistent with the panel's conclusions, along with a lengthy report. Docs. 120-1, 120-2. Like the Carter policy, the Mattis policy affirms that "transgender persons should not be disqualified from service solely on account of their transgender status." Doc. 120-2 at 19. And like the Carter policy, the Mattis policy draws distinctions on the basis of a medical condition (gender dysphoria) and its treatment (gender transition). *Id.* at 32-43. Like the Carter policy, the Mattis policy provides that those without a history or diagnosis of gender dysphoria would be

required, like all other servicemembers, to serve in their biological sex, whereas individuals with a history of gender dysphoria would be presumptively disqualified from service. *Id.* at 32, 41-43.

The two policies differ in their particular exceptions to that disqualification and the conditions under which individuals with gender dysphoria may join or remain in the military. Under the Mattis accession standards, individuals with a history of gender dysphoria would be permitted to join the military if they have not undergone gender transition, are willing and able to serve in their biological sex, and can show 36 months of stability before joining. Doc. 120-2 at 42. Under the Mattis retention standards, servicemembers who are diagnosed with gender dysphoria after entering service would be permitted to continue serving if they do not seek to undergo gender transition, are willing and able to serve in their biological sex, and are able to meet applicable deployability requirements. *Id.* The Mattis policy, however, exempts from its scope "transgender Service members who were diagnosed with gender dysphoria and either entered or remained in service following the announcement of the Carter policy," and permits those servicemembers to continue serving under the terms of the Carter policy. *Id.* at 43.

4. On March 23, 2018, the President issued a new memorandum that "revoke[d]" his 2017 memorandum "and any other directive [he] may have made with respect to military service by transgender individuals." Doc. 120-3 at 1. The 2018 memorandum emphasized that the resulting Mattis policy reflected "the exercise of

[Secretary Mattis's] independent judgment," and the President permitted the Secretaries of Defense and Homeland Security to implement the new policy. *Id.*

B. Procedural History

1. Shortly after the President issued his 2017 memorandum, plaintiffs—current and aspiring servicemembers and the American Civil Liberties Union of Maryland—brought this suit, challenging what they described as the "Ban" on military service by transgender individuals reflected in the President's 2017 tweets and memorandum. Add. 15.

Similar suits were filed in the Central District of California (*Stockman*), the Western District of Washington (*Karnoski*), and the District of Columbia (*Doe*), claiming that the President's 2017 pronouncements violated equal protection. *See Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal. filed Sept. 5, 2017); *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. filed Aug. 28, 2017); *Doe v. Shanahan*, No. 17-cv-1597 (D.D.C. filed Aug. 9, 2017). The district courts in each of those proceedings entered nationwide preliminary injunctions prohibiting the enforcement of the 2017 memorandum and requiring the military to maintain the Carter policy. *See Stockman*, No. 17-cv-1799, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017); *Karnoski*, No. 17-cv-1297, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017); *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. Oct. 30, 2017).

In November 2017, the district court in this case also issued a nationwide preliminary injunction prohibiting the military from enforcing the relevant "policies

and directives encompassed in President Trump's [2017] Memorandum." Add. 126. The court concluded that plaintiffs were likely to succeed on the merits of their equal protection claim. Add. 113-16. It held, consistent with the *Doe* district court's opinion, that transgender individuals constituted a quasi-suspect class, that intermediate scrutiny applied, and that the presidential directives were "unlikely to survive a rational review." Add. 115-16. The court then "adopt[ed]" and found "persuasive" the reasoning in *Doe* that "the departure from normal procedure" refuted the government's assertion of legitimate military interests. *Id.*

The government appealed, *see* Doc. 86, and sought a partial stay pending appeal so that the military would not be required to implement the Carter policy's accession standards immediately. This Court and the district court denied the requests for a stay. *See Stone*, No. 17-2398, 2017 WL 9732004 (4th Cir. Dec. 21, 2017); Add. 71-72. In denying a stay, the district court refused to clarify whether the injunction "prohibit[s] the Secretary of Defense from exercising his independent discretion" with regard to the Carter policy, which in effect prevented the military from implementing any new policy absent further order of the district court. Add. 69. The government voluntarily dismissed its appeal on the expectation that then-Secretary Mattis would soon propose a policy that would moot any appeal. *See Stone*, No. 17-2398, 2018 WL 2717050 (4th Cir. Feb. 2, 2018).

2. On March 23, 2018, in light of the President's memorandum revoking his 2017 memorandum (and any similar directive) and permitting the military to adopt the

Mattis policy issued that same day, the government moved to dissolve the preliminary injunction. Doc. 120. The government urged that the Mattis policy was the product of independent military judgment, that it should be assessed under principles of military deference, and that it survives constitutional scrutiny. *Id.* at 8-32. In May 2018, the government filed a motion to dismiss or in the alternative for summary judgment. Doc. 158. In June 2018, the judge originally assigned to this case (Judge Marvin J. Garbis) retired, and in July 2018, the case was reassigned to Judge George Levi Russell, III.

In August 2018, the magistrate judge ruled on discovery motions filed by the parties in June 2018 and ordered the government to produce deliberative materials concerning both the President's 2017 tweets and memorandum as well as the military's 2018 policy. *See* Docs. 204, 205. The government promptly objected to the magistrate judge's decision and moved to stay compliance with the order. Docs. 208, 209. On November 30, 2018, the district court overruled the government's objections but granted the government's stay motion in light of a parallel discovery dispute pending before the Ninth Circuit. Docs. 227, 228.

The government's March 2018 motion to dissolve and the May 2018 motion for dismissal or summary judgment remain pending.[1]

[1] Earlier in March 2018, the government also moved to dismiss the President as an improper party and to dissolve the preliminary injunction insofar as it enjoined the President. Doc. 115. The district court has not acted on that motion, either.

3. The government also filed motions to dissolve preliminary injunctions in *Stockman*, *Karnoski*, and *Doe*. Unlike the district court in this case, those district courts acted on the government's motions, and the government appealed in each case. *See Stockman*, 331 F. Supp. 3d 990 (C.D. Cal. Sept. 18, 2018), *appeal docketed*, No. 18-56539 (9th Cir. Nov. 16, 2018); *Karnoski*, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018), *appeal docketed*, No. 18-35347 (9th Cir. Apr. 30, 2018); *Doe*, 315 F. Supp. 3d 474 (D.D.C. Aug. 6, 2018), *rev'd Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309, at *2 (D.C. Cir. Jan. 4, 2019) (per curiam). In November 2018, after argument in *Karnoski* and completion of briefing in *Doe*, the government sought a writ of certiorari before judgment in all three appeals. The government informed the Supreme Court that, "[a]s a result of nationwide preliminary injunctions issued by various district courts, . . . the military has been forced to maintain [the Carter] policy for nearly a year"—"a policy that, in its professional judgment, risks undermining readiness, disrupting unit cohesion, and weakening military effectiveness and lethality." Nov. 23, 2018 Letter 1-2, *Trump v. Karnoski*, No. 18-676 (U.S.) (also filed in *Doe* and *Stockman*). The government sought the Supreme Court's intervention "to ensure that the injunctions do not remain in place any longer than is necessary." *Id.* at 1.

The government also filed applications with the Supreme Court for stays of the preliminary injunctions—or, at a minimum, the nationwide aspects of those injunctions—as an alternative to certiorari. *E.g.*, Stay Appl., *Trump v. Karnoski*, No. 18A625 (U.S. Dec. 13, 2018). The applications again emphasized that the injunctions

force the Department of Defense "to maintain a policy that it has determined poses 'substantial risks' and threatens to 'undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.'" *Id.* at 37.

The applications also informed the Supreme Court that, in the present case, the government had "moved nine months ago to dissolve [the] injunction in light of the new Mattis policy," but that the district court "has not ruled on the government's pending motion." *Karnoski* Stay Appl. at 38-39. But, as the government explained, "[i]f this Court were to stay the injunctions in these cases in whole or in part, that decision would be binding precedent on the application of the stay factors to such an injunction and would therefore require the district court to similarly stay the injunction in *Stone*." *Id.* at 40 n.17.

Before the Supreme Court had acted on the certiorari petitions and stay applications, the D.C. Circuit vacated the preliminary injunction in *Doe*. The D.C. Circuit explained that "[t]he government took substantial steps to cure the procedural deficiencies the [district] court identified in the enjoined 2017 Presidential Memorandum," including "the creation of a panel of military and medical experts, the consideration of new evidence gleaned from the implementation of the [Carter Policy] . . . , and a reassessment of the priorities of the group that produced the Carter Policy." *Doe 2*, 2019 WL 102309, at *2. Those steps, the court of appeals concluded, meant that the Mattis policy was not "foreordained." *Id.* The D.C. Circuit also

explained that the Mattis policy is not "the equivalent of a blanket ban on transgender service," as it "appears to permit some transgender individuals to serve in the military consistent with established military mental health, physical health, and sex-based standards," based upon "the 'considered professional judgment' of 'appropriate military officials.'" *Id.* at *2-3 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)). The court of appeals concluded that "the military has substantial arguments for why the Mattis [policy] complies with the equal protection principles of the Fifth Amendment," and "any review must be 'appropriately deferential' in recognition of the fact that the Mattis [policy] concern[s] the composition and internal administration of the military." *Id.* at *3.

4. On January 22, 2019, the Supreme Court stayed the remaining preliminary injunctions in *Karnoski* and *Stockman* in their entirety. The Supreme Court granted each stay "pending disposition of the Government's appeal[s] . . . and disposition of the Government's petition for a writ of certiorari, if such writ is sought." *Trump v. Karnoski*, No. 18A625, 2019 WL 271944 (U.S. Jan. 22, 2019); *Trump v. Stockman*, No. 18A627, 2019 WL 271946 (U.S. Jan. 22, 2019). The *Karnoski* plaintiffs subsequently indicated that they are abandoning their defense of the preliminary injunctions on appeal. *See* Notice of Withdrawal of Opp'n to Vacatur and Remand (Doc. 144), *Karnoski*, No. 18-35347 (9th Cir. Jan. 30, 2019). Likewise, the *Stockman* plaintiffs consented to summary vacatur if the Ninth Circuit grants such relief in *Karnoski*. *See*

Resp. to Notice of Withdrawal of Opp'n to Vacatur and Remand (Doc. 31), *Stockman*, No. 18-56539 (9th Cir. Jan. 30, 2019).

5. The government notified the district court in this case of the Supreme Court's order on the day that it issued. The notice informed the district court that "[t]he preliminary injunctions stayed in *Karnoski* and *Stockman* are indistinguishable from the preliminary injunction in this case, and the Supreme Court's order is binding precedent on the application of the stay factors to the injunction at issue here." Add. 9. The government therefore asked the court to "immediately dissolve [the] November 21, 2017, preliminary injunction on the government's pending motion"—which still remains pending—"or, at a minimum, immediately stay its injunction." *Id.*

Two days later, on January 24, 2019, the government filed a stay motion and requested an expedited ruling "to ensure that the Supreme Court's order of January 22, 2019 . . . has full effect and the Department of Defense may begin implementing the policy announced by former Secretary of Defense James Mattis on March 23, 2018." Add. 1. In response, plaintiffs conceded that the district court should stay the preliminary injunction, objecting only that the injunction should remain in place for five individual plaintiffs. Doc. 235 at 1; *see* Doc. 233 at 2 (similar). Plaintiffs did not oppose the request for an expedited ruling.

The district court has not acted on the government's expedited motion to stay its preliminary injunction.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS MANDAMUS AUTHORITY TO DIRECT THE DISTRICT COURT TO STAY THE PRELIMINARY INJUNCTION CONSISTENT WITH THE SUPREME COURT'S ORDER

1. Action by this Court is plainly warranted. The Supreme Court has issued stays of materially indistinguishable injunctions in cases in which the district courts, unlike the district court here, acted on the government's motion to dissolve preliminary injunctions in light of the March 2018 rescission of the policy that gave rise to the suits. In each case, the district court entered a preliminary injunction requiring the military to maintain the Carter policy and prohibiting the military from implementing its preferred policy. *Karnoski v. Trump*, No. 17-cv-1297, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017); *Stockman v. Trump*, No. 17-cv-1799, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017); *see* Add. 126-27. In each case, the district court repeatedly determined that the military was not entitled to deference and that the challengers were likely to prevail on their equal protection claims. *Karnoski*, 2017 WL 6311305, at *7-8; *Stockman*, 2017 WL 9732572, at *14-15; *see Karnoski*, 2018 WL 1784464, at *9-13 (W.D. Wash. Apr. 13, 2018); *Stockman*, 331 F. Supp. 3d 990, 1000-04 (C.D. Cal. 2018); *see also* Add. 113-16.

The Supreme Court stayed the injunctions in their entirety even prior to the exercise of its certiorari jurisdiction, and its assessment of the factors relevant to the stay determination is, of course, binding on courts of appeals and district courts. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (holding where precedent of the Supreme

Court "has direct application in a case . . . [lower courts] should follow the case which directly controls") (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

The Supreme Court's guidance could not be clearer, and no basis exists for barring implementation of a military policy that the Supreme Court has decreed should be allowed to go forward pending the ultimate disposition of the various challenges. The district court should not be allowed to impede these directives by failing to act on the motion to dissolve for nearly a year, thereby frustrating the government's ability to appeal a decision to this Court, and by then failing to act on a largely unopposed motion to stay. Plainly, there are "'no other adequate means to attain the [requested] relief,'" and it is equally evident that the "'right to issuance of the writ is clear and indisputable.'" *United States v. Moussaoui*, 333 F.3d 509, 517 (4th Cir. 2003) (quoting first *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976) and also *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)).

Indeed, when the Supreme Court has intervened to stay a preliminary injunction, this Court has found it appropriate to "stay" its own decisions that would instead maintain those preliminary injunctions, "[i]n light of the Supreme Court's order." *International Refugee Assistance Project v. Trump*, 883 F.3d 233, 274 (4th Cir. 2018) (en banc) (staying this Court's decision to affirm the injunction). That same course is plainly "appropriate under the circumstances" here. *South Carolina v. United States*, 907 F.3d 742, 755 (4th Cir. 2018).

2. A stay of the injunction in its entirety is equally warranted here. Although plaintiffs have acknowledged that the preliminary injunction should be stayed, they urge that it should remain in place with regard to five individual plaintiffs. Doc. 235 at 4-5. But the Supreme Court stayed the related injunctions on their face, including as applied to the particular plaintiffs in *Karnoski* and *Stockman*, despite their claims that a stay would cause them individualized, irreparable harm. *See, e.g.*, *Karnoski* Stay Appl. Opp'n at 30-31, No. 18A625 (U.S. Dec. 28, 2018); *Stockman* Stay Appl. Opp'n at 38, No. 18A627 (U.S. Dec. 28, 2018). By staying the injunctions in their entirety, the Supreme Court necessarily rejected the option of leaving the injunctions in place as to the individual plaintiffs.

Plaintiffs' efforts to distinguish five individual plaintiffs from those in *Karnoski* and *Stockman* are unavailing. *See* Doc. 235 at 4-5. They have pointed out that three individual plaintiffs—Niko Branco, Ryan Wood, John Doe 2—who have undergone gender transition would be unable to enlist absent a waiver under the Mattis policy, but those plaintiffs are materially indistinguishable from the individual challengers in *Karnoski* and *Stockman*, who also have undergone gender transition. *See* First Am. Compl. ¶¶ 135, 138 (Doc. 30), *Karnoski*, No. 17-cv-1297 (W.D. Wash. Sept. 14, 2017) (Conner Callahan); Compl. ¶¶ 10-12 (Doc. 1), *Stockman*, No. 17-cv-1799 (C.D. Cal. Sept. 5, 2017) (Aiden Stockman, Nicolas Talbott, Tamasyn Reeves); Pls.' Joint Opp'n to Defs.' Mot. to Dissolve the Prelim. Inj. 21–22 (Doc. 98), *Stockman*, No. 17-cv-1799 (C.D. Cal. Apr. 25, 2018) (stating that each plaintiff seeking to join the military "has

gone through gender transition"). The remaining two individual plaintiffs—Airman First Class Seven Ero George and Petty Officer First Class Teagan Gilbert—are current enlisted servicemembers who seek to become officers, Docs. 235-2, 235-3, and thus face the same alleged harm as *Karnoski* plaintiff Staff Sergeant Cathrine Schmid, *see Karnoski*, 2017 WL 6311305, at *4 ("Plaintiff Schmid has been refused consideration for appointment as a warrant officer and faces a credible threat of being denied opportunities for career advancement."). In no event, however, is there a legal basis for the Court to carve out individual plaintiffs when the Supreme Court has already determined that the Department of Defense's 2018 policy should go into effect nationwide without exception.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of mandamus and order the district court to grant the government's motion to stay the preliminary injunction in its entirety, pending resolution of the government's motion to dissolve the preliminary injunction and pending any further appellate proceedings.

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MARCH 2019

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limit of Federal Rule of Appellate Procedure 21(d)(1) because it contains 3,954 words. This petition also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Tara S. Morrissey
Tara S. Morrissey

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service on counsel for all parties in the district court has been accomplished by notice filed through the district court's CM/ECF system attaching a copy of this filing, as well as by e-mail to the following:

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The district court has been provided a copy of this filing via notice filed on the district court docket, as well as by hand delivery.

s/ *Tara S. Morrissey*
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Petitioners.	No. 2019-_____ D. Ct. No. 1:17-cv-2459-GLR

ADDENDUM TO THE PETITION FOR A WRIT OF MANDAMUS

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case 1:17-cv-02459-GLR Hon. George L. Russell, III

DEFENDANTS' MOTION TO STAY THE PRELIMINARY INJUNCTION AND REQUEST FOR EXPEDITED RULING

Defendants respectfully request a stay of the Court's preliminary injunction, pending the resolution of Defendants' Motion to Dissolve the Preliminary Injunction, ECF No. 120, and if the Court denies that motion, pending an appeal to the Court of Appeals for the Fourth Circuit and any further proceedings before the Supreme Court. Although the Court's present injunction applies exclusively to the now rescinded Presidential Memorandum of August 25, 2017, *see* ECF No. 84, the Government requests a stay of that injunction out of an abundance of caution to ensure that the Supreme Court's order of January 22, 2019, *see* ECF No. 232, has full effect and the Department of Defense may begin implementing the policy announced by former Secretary of Defense James Mattis on March 23, 2018.

In their Response to Defendants' Notice of Supplemental Authority, Plaintiffs concede that "it would be appropriate for this Court to stay the nationwide effect of its injunction pending appeal" but believe that the "injunction should remain in effect with respect to a small number of individual plaintiffs who would suffer severe and immediate harm." Pls.' Resp. to Defs.' Notice of Suppl. Authority at 2, ECF No. 233. Thus, the parties

disagree solely as to whether only the nationwide aspects of the Court's injunction must be stayed or the injunction must be stayed in its entirety. Because the Supreme Court's order granted Defendants' stay request in full and stayed the *Karnoski* and *Stockman* injunctions in their entirety, a similar stay of this Court's preliminary injunction, in its entirety, is required here.[1]

PROCEDURAL BACKGROUND[2]

Plaintiffs filed this action on August 28, 2017, raising constitutional challenges to the President's 2017 Memorandum concerning military service by transgender individuals. Compl., ECF No. 1. Similar suits were filed in the District of Columbia, the Western District of Washington, and the Central District of California. *See Doe v. Shanahan*, No. 17-cv-1597 (D.D.C. filed Aug. 9, 2017); *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. filed Aug. 28, 2017); *Stockman* v. *Trump*, No. 17-cv-1799 (C.D. Cal. filed Sep. 5, 2017).

On November 21, 2017, this Court issued a nationwide preliminary injunction, enjoining Defendants from enforcing or implementing certain "policies and directives encompassed in President Trump's Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017, and entitled 'Military Service by Transgender Individuals[.]'" ECF No. 84. The district courts in *Doe, Karnoski,* and *Stockman* similarly issued nationwide preliminary injunctions enjoining Defendants from enforcing or implementing the Presidential Memorandum. *Doe v. Shanahan*, No. 17-cv-1597 (D.D.C.), ECF No. 60; *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.), ECF No. 103; *Stockman* v. *Trump*, No. 17-cv-1799 (C.D. Cal.), ECF No. 79. In March 2018, the Government informed the

[1] In light of the Supreme Court's order, the Government requests a ruling on its stay request as expeditiously as possible.

[2] The background regarding the creation of the military's new policy is set forth in Defendants' Motion to Dissolve the Preliminary Injunction. *See* Defs.' Mot. 2–8, ECF No. 120.

Court that the President had issued a new memorandum, which revoked his 2017 memorandum (and any similar directive) and allowed the military to adopt Secretary Mattis's proposed policy. *See* Defs.' Notice, ECF No. 119; *see also* Defs.' Mot. to Dissolve the Prelim. Inj., ECF No. 120. In light of that new policy, on March 23, 2018, the Government moved to dissolve the November 2017 injunction. Defs.' Mot. to Dissolve the Prelim. Inj., ECF No. 120. The Government's motion remains pending before this Court.

In March 2018, the Government also moved to dissolve the three nationwide injunctions issued in the related litigation. *Doe v. Shanahan*, No. 17-cv-1597 (D.D.C.), ECF No. 96; *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.), ECF No. 215; *Stockman* v. *Trump*, No. 17-cv-1799 (C.D. Cal.), ECF No. 82. In each instance the district court denied the government's motion and declined to dissolve the preliminary injunction. *Doe v. Shanahan*, No. 17-cv-1597 (D.D.C.), ECF No. 157; *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.), ECF No. 233; *Stockman* v. *Trump*, No. 17-cv-1799 (C.D. Cal.), ECF No. 124. In each instance the Government appealed. *See Doe v. Shanahan*, No. 18-cv-5257 (D.C. Cir.); *Karnoski v. Trump*, No. 18-35347 (9th Cir.); *Stockman* v. *Trump*, No. 18-56539 (9th Cir.). And in each instance the Government further sought a stay of the district court injunctions pending appeal. *Doe v. Shanahan*, No. 17-cv-1597 (D.D.C.), ECF No. 183; *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.), ECF No. 238; *Stockman* v. *Trump*, No. 17-cv-1799 (C.D. Cal.), ECF No. 130.

On January 4, 2019, the Court of Appeals for the D.C. Circuit reversed the district court's denial of Defendants' motion to dissolve the preliminary injunction in *Doe v. Shanahan,* vacated the preliminary injunction, and denied the Government's stay request as moot. *See* ECF No. 230. On January 22, 2019, the Supreme Court granted the Government's request for a complete stay of the district courts' preliminary injunctions in both *Karnoski v. Trump* and *Stockman v. Trump* pending the Government's Ninth Circuit appeal and disposition of the

Government's petition for a writ of certiorari, if such writ is sought. *See* ECF No. 232. Among the related cases, this Court's nationwide preliminary injunction is the only injunction that has not been vacated or stayed. However, the Supreme Court's action is binding here and must result in a stay of this Court's preliminary injunction, in its entirety, pending the resolution of Defendants' Motion to Dissolve the Preliminary Injunction, and if the Court denies that motion, pending an appeal to the Court of Appeals for the Fourth Circuit and any further proceedings before the Supreme Court.

ARGUMENT

Because a preliminary injunction and stay are both forms of preliminary equitable relief, courts in the Fourth Circuit have applied the four factor test established in *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009), derived from the Supreme Court's decision in *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008), when considering a stay of an injunction. *See Rose v. Logan*, 13-3592, 2014 U.S. Dist. LEXIS 98404, 2014 WL 3616380 (D. Md. July 21, 2014); *Doe v. Cooper*, No. 13-711, 2016 U.S. Dist. LEXIS 192534, at *3 (M.D.N.C. Mar. 2, 2016). The standard in *Real Truth* requires the movant to establish the following factors: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." 575 F.3d at 346.

Even when courts enter injunctions, those same courts regularly find cause to stay their own rulings entering, dissolving, or modifying injunctions. *See, e.g.*, *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842 (D.C. Cir. 1977) (holding that district court did not abuse its discretion by entering permanent injunction and then staying it pending appeal); *Thiry v. Carlson*, 891 F. Supp. 563, 567 (D. Kan. 1995) (granting stay pending appeal of court's own order dissolving preliminary injunction). This holds with particular force when

the Supreme Court has intervened to grant a stay of a preliminary injunction. *See Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 274 (4th Cir. 2018) ("In light of the Supreme Court's order staying this injunction pending disposition of the Government's petition for a writ of certiorari, if such writ is sought, we stay our decision today pending the Supreme Court's decision.") (internal quotations and citation omitted); *see also Hawaii v. Trump*, 878 F.3d 662, 702 (9th Cir. 2017) ("In light of the Supreme Court's order staying this injunction pending disposition of the Government's petition for a writ of certiorari, if such writ is sought, we stay our decision today pending Supreme Court review.") (internal quotations and citation omitted).

Here, the Supreme Court has acted on the Government's applications in two of the related cases by staying similar injunctions, in their entirety, issued in response to the same legal challenges to the same Department of Defense policies, and that action is binding on this Court. *See* Mem. Op. of November 30, 2018, ECF No. 227 at 4 n.7 (noting that the district courts in *Doe*, *Karnoski*, and *Stockman* issued injunctions similar to this Court's November 21, 2017 preliminary injunction barring implementation of the same challenged policy); Pls.' Notice of Suppl. Authority, ECF No. 143 (acknowledging that the *Stone* Plaintiffs bring the same constitutional challenges to the same policies as the *Doe* and *Karnoski* Plaintiffs); Pls.' Notice of Suppl. Authority, ECF No. 218 (acknowledging that the *Stone* Plaintiffs bring the same constitutional challenges to the same policies as the *Stockman* Plaintiffs). In doing so, the Supreme Court considered the same factors the district court must consider here and determined that a stay of the preliminary injunctions issued in *Karnoski* and *Stockman* was warranted. The Supreme Court's application of those stay factors to the present injunction is thus binding here and must result in a stay of this Court's preliminary injunction pending the resolution of Defendants' Motion to Dissolve the Preliminary Injunction, ECF No. 120, and

if the Court denies that motion, pending an appeal to the Court of Appeals for the Fourth Circuit and any further proceedings before the Supreme Court. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We reaffirm that '[i]f a precedent of this Court has direct application in a case…[lower courts] should follow the case which directly controls[.]") (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

Plaintiffs acknowledge that "in light of the Supreme Court's Order, it would be appropriate for this Court to stay the nationwide effect of its injunction pending appeal" but believe that the "injunction should remain in effect with respect to a small number of individual plaintiffs who would suffer severe and immediate harm." Pls.' Resp. to Defs.' Notice of Suppl. Authority at 2, ECF No. 233. However, the Supreme Court's order granted Defendants' stay request in full and stayed the *Karnoski* and *Stockman* injunctions in their entirety. Thus, a similar stay of this Court's preliminary injunction, in its entirety, is required here.

Moreover, Plaintiffs err in contending that the Supreme Court's order leaves this Court room to "exercis[e] its equitable discretion" to stay only the nationwide aspect of the injunction. *Id.* Plaintiffs contend that Defendants' arguments in the Supreme Court "centered on the nationwide effects" of the injunctions at issue. *Id.* But Defendants' stay applications in the Supreme Court asked the Court to "stay [each] injunction in its entirety," *Karnoski* Stay Appl. at 1, No. 18-676 (S. Ct. 2018) and requested a stay of "the nationwide scope of [each] injunction" only in the alternative to a full stay, *id.* at 2; *see id.* at 3 ("*At a minimum*, the Court should stay the nationwide scope of the injunction . . . .") (emphasis added); *id.* at 40 (same). Plaintiffs also contend that, if the injunction in this case is stayed in its entirety, the individual plaintiffs will "suffer severe and immediate harm." Pls.' Resp. to Defs.' Notice of Suppl. Authority at 2, ECF No. 233. But the plaintiffs in the Supreme Court likewise argued

that a full stay would cause the individual plaintiffs to "suffer serious irreparable injury." Karnoski Stay Appl. Opp'n at 30, No. 18A-625 (S. Ct. 2018). And in applying the stay factors, the Supreme Court nevertheless determined that a full stay of each injunction was warranted. The Supreme Court's order thus leaves no room for a different result here.

REQUEST FOR EXPEDITED RULING

In light of the Supreme Court's January 22, 2019 order and the fact that this Court's nationwide injunction is the only remaining injunction among the related cases, Defendants respectfully request an expedited ruling on this motion.

CONCLUSION

The Government respectfully requests that this Court stay the preliminary injunction, in its entirety, pending the resolution of Defendants' Motion to Dissolve the Preliminary Injunction, ECF No. 120, and if the Court denies that motion, pending an appeal to the Court of Appeals for the Fourth Circuit and any further proceedings before the Supreme Court.

January 24, 2019

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case 1:17-cv-02459-GLR Hon. George L. Russell, III

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants respectfully provide notice to the Court that the Supreme Court today granted the government's applications to stay the district courts' preliminary injunctions in the related cases *Trump v. Karnoski* and *Trump v. Stockman.* The Supreme Court's order is available at *Trump v. Karnoski,* No. 18A625, and *Trump v. Stockman*, No. 18A627 (U.S. Jan. 22, 2019), https://www.supremecourt.gov/orders/courtorders/012219zor_8759.pdf.

The preliminary injunctions stayed in *Karnoski* and *Stockman* are indistinguishable from the preliminary injunction in this case, and the Supreme Court's order is binding precedent on the application of the stay factors to the injunction at issue here. Accordingly, in light of the Supreme Court's order, this Court should immediately dissolve its November 21, 2017, preliminary injunction on the government's pending motion, ECF No. 120, or, at a minimum, immediately stay its injunction. Out of an abundance of caution, the government plans to file a motion to stay the injunction with the Court as soon as possible.

January 22, 2019

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PETTY OFFICER FIRST CLASS BROCK STONE, (Anne Arundel County, Maryland) STAFF SERGEANT KATE COLE, STAFF SERGEANT JOHN DOE 1, AIRMAN FIRST CLASS SEVEN ERO GEORGE, PETTY OFFICER FIRST CLASS TEAGAN GILBERT, TECHNICAL SERGEANT TOMMIE PARKER, TEDDY D'ATRI, RYAN WOOD, NIKO BRANCO, JOHN DOE 2, JANE ROE 1, JOHN DOE 3, by his next friends and mother and father JANE ROE 2 and JOHN DOE 4* *and* AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, INC., 3600 Clipper Miller Road, Suite 350 Baltimore, MD 21211 Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States 1600 Pennsylvania Avenue NW Washington, D.C. 20500 JAMES MATTIS, in his official capacity as Secretary of Defense U.S. Department of Defense	)	Case No. 17-cv-02459

* On September 29, 2017, the Court granted a joint motion to waive the original Plaintiffs' obligation under Local Rule 102.2(a) to provide addresses, and to permit Plaintiff Doe to proceed anonymously. *See* Order, ECF 50. Concurrently with the filing of the Motion for Leave to File a Second Amended Complaint, Plaintiffs are moving similarly to waive their obligations and those of new plaintiffs D'Atri, Wood, Branco, Doe 2, Roe 1, Doe 3, Roe 2, and Doe 4 under Local Rule 102.2(a) to provide addresses in the caption of this complaint, on the basis of their objectively reasonable fear that publicizing their home addresses would subject them to harassment (potentially including violence) and threats. For similar reasons, Plaintiffs are concurrently moving to permit new plaintiffs Doe 2, Roe 1, Doe 3, Roe 2, and Doe 4 to proceed anonymously.

1400 Defense Pentagon)
Washington, D.C. 20301)
)
MARK ESPER,)
in his official capacity as Secretary of the)
U.S. Department of the Army)
101 Army Pentagon)
Washington, D.C. 20301)
)
RICHARD SPENCER,)
in his official capacity as Secretary of the)
U.S. Department of the Navy)
1200 Navy Pentagon)
Washington D.C. 20350)
)
HEATHER WILSON)
in her official capacity as Secretary of the)
U.S. Department of the Air Force)
1690 Air Force Pentagon)
Washington, D.C. 20330)
)
KIRSTJEN NIELSEN)
in her official capacity as Secretary of)
Homeland Security)
Nebraska Avenue Complex)
3801 Nebraska Ave NW,)
Washington, D.C. 20016-2075)
)
PAUL ZUKUNFT)
in his official capacity as Commandant of the)
U.S. Coast Guard)
2700 Martin Luther King Jr. Avenue SE)
Washington, D.C. 20593-7000)
)
Defendants.)

SECOND AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

NATURE OF THE ACTION

1. Thousands of transgender service members are serving honorably in this country's Armed Forces. Some perform critical roles in intelligence analysis, disaster relief, medical care, and pre-deployment training at bases in the United States. Others have deployed to

combat zones in Iraq and Afghanistan. Many transgender service members have received awards for their service, and some have served for decades. All have answered the selfless call of service to our nation by putting themselves in harm's way to protect the rights and freedoms fundamental to this country.

2. Thousands more transgender Americans wish to answer the call to service. Some consider it their patriotic duty. Some come from families with a tradition of military service. Others see the benefits that a military career could bring to their lives. All are willing to make great sacrifices for the benefit of our country.

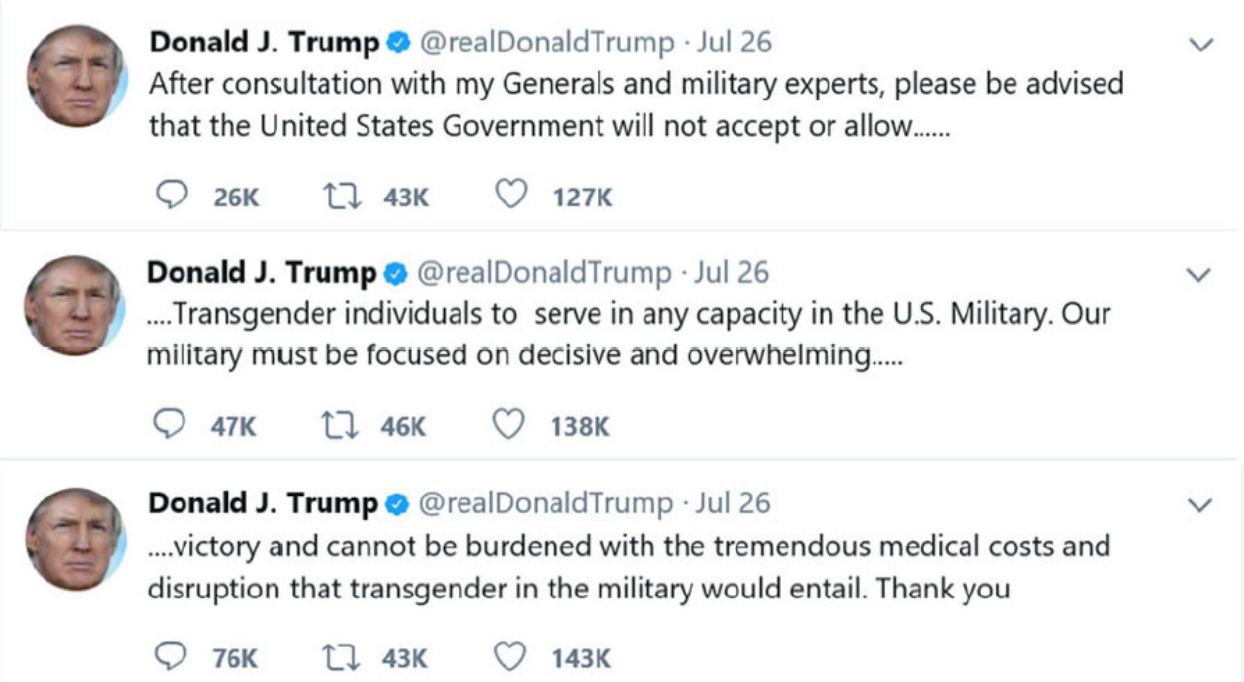
3. Six of the Plaintiffs in this case ("Serving Plaintiffs") are transgender service members. Petty Officer Stone has served in the U.S. Navy for 11 years, including a nine-month deployment to Afghanistan, and is currently assigned to a unit at Fort Meade, in Maryland. Staff Sergeant Cole has served in the U.S. Army for almost ten years, including a one-year deployment to Afghanistan where she served as a team leader and designated marksman. Staff Sergeant Doe 1 has served for approximately six years on active duty in the U.S. Air Force, where he was awarded "Airman of the Year" for his flight. Airman First Class George has been enlisted in the Air National Guard since 2015. He is training as a nurse, and intends to seek a commission in the U.S. Army. Petty Officer Gilbert has served in the U.S. Navy for 13 years, including a one-year deployment to Afghanistan, and currently serves as an information and space systems technician. Technical Sergeant Parker served in the Marine Corps for four years and has served in the Air National Guard for 26 years, now working as a fuel technician.

4. Six additional Plaintiffs ("Enlisting Plaintiffs") are transgender individuals who wish to join the military. Niko Branco is seeking to join the Army. Teddy D'Atri, John Doe 2, and Jane Roe 1 are seeking to join the Air Force. Ryan Wood is seeking to join the Marine

Corps. John Doe 3 is a minor who wishes to join the Coast Guard when he is age eligible. Each of them has taken concrete steps to prepare to enlist and serve their country. As a minor, John Doe 3 is represented by Jane Roe 2 and John Doe 4 as his mother and father and next friends (together with the Serving Plaintiffs and Enlisting Plaintiffs, the "Individual Plaintiffs").

5. At the culmination of a thorough process of research and analysis, the Department of Defense ("DoD") concluded in 2016 that there was no basis for the military to exclude men and women who are transgender from openly serving their country, subject to the same fitness requirements as other service members. This review process carefully considered and rejected the notion that medical costs, military readiness, or other factors presented any plausible reason to discriminate against service members who are transgender, many of whom had already been serving with honor in silence for decades. Accordingly, the Secretary of Defense issued a directive (the "Open Service Directive") that service members who are transgender be permitted to serve openly without fear of discharge; that these service members receive medically necessary health care, as do others who serve their country; and that, beginning on July 1, 2017, men and women who are transgender be permitted to enlist in the military subject to stringent enlistment standards. The starting date for new enlistments was subsequently postponed for six months to January 1, 2018.

6. On the morning of July 26, 2017, President Trump declared on Twitter that the Serving and Enlisting Plaintiffs and all other men and women who are transgender would no longer be allowed either to join or to continue serving in the military "in any capacity." This pronouncement was posted under the handle @realDonaldTrump:



7. The Trump Administration has provided no evidence that this pronouncement was based on any analysis of the actual cost and disruption allegedly caused by allowing men and women who are transgender to serve openly. News reports indicate that the Secretary of Defense and other military officials were surprised by President Trump's announcement, and that his actual motivations were purely political, reflecting a desire to accommodate legislators and advisers who bear animus and moral disapproval toward men and women who are transgender.

8. On August 25, 2017, President Trump formalized his ban in a Memorandum for the Secretary of Defense and the Secretary of Homeland Security, with the subject "Military Service by Transgender Individuals" (the "Transgender Service Member Ban"). President Trump directed the Secretary of Defense to "return to" the pre-2016 policy of banning enlistment and service by men and women who are transgender, which he described as "generally prohibit[ing] openly transgender individuals from accession into the United States military and authoriz[ing] the discharge of such individuals." President Trump further banned the use of government resources to fund "sex-reassignment surgical procedures" for service members regardless of cost

or medical necessity. President Trump ordered Secretary of Defense James Mattis to develop a "plan for implementing" the directives by February 21, 2018, so they could be fully implemented by March 23, 2018.

9. President Trump delayed the operation of some of his directives, but their impact was felt immediately. Planned medical treatment was canceled, treatment plans were modified, and recommendations and requests for new treatment were denied to service members who are transgender. Military recruiters were reportedly confused as to how or whether to enlist transgender individuals. The six-month preparation period only served as a brief delay to the full implementation of President Trump's unequivocal policy pronouncement.

10. Four federal courts—including this Court—issued preliminary injunctions prohibiting the White House and the military from taking any action to enforce President Trump's ban. As a result of those injunctions, the Open Service policy remained in effect, and the military began accepting transgender recruits on January 1, 2018. Three of the Enlisting Plaintiffs submitted applications to join the military shortly thereafter.

11. On February 22, 2018, Secretary Mattis submitted to the President an implementation plan, which set forth a two-pronged approach for banning transgender individuals from the military. First, transgender individuals who "require or have undergone gender transition" are automatically disqualified from military service. Second, all other transgender individuals may serve only "*in their biological sex* (emphasis added)."

12. Secretary Mattis's implementation plan remained secret until March 23, 2018, when President Trump issued a second Memorandum acknowledging receipt of the implementation plan and authorizing Secretary Mattis to proceed with his plans for implementation.

13. As a consequence of the Transgender Service Member Ban and the Department of Defense's plan to implement it, thousands of Americans already serving their country—many of whom publicly revealed that they are transgender after DoD formally welcomed their service in June 2016—have been told that they are unfit to serve and a burden whose presence imposes "disproportionate costs." All transgender Americans who wish to enlist in the military have had the doors to military service shut in their faces. The few service members who are allowed to remain will face an uncertain future in which the Department of Defense has implemented the President's ban by calling into question their physical fitness and mental stability simply because they are transgender—to the alarm of the mainstream medical community.

14. When President Trump first announced his Ban via Twitter, he cast aside the rigorous, evidence-based policy of the Open Service Directive, and replaced it with discredited myths and stereotypes, uninformed speculation, and animus against people who are transgender. Defendants then sought to reverse-engineer a post-hoc justification to shore up the conclusions President Trump had already reached.

15. Transgender people have been serving openly for the past year and a half. They have been deploying across the globe, serving with distinction as critical members of their units. That dispositive reality cannot be nullified by President Trump's tweets or the efforts of the Department of Defense to satisfy the whims of a President who had already made up his mind.

16. Plaintiffs bring this action to right this unconstitutional wrong.

THE PARTIES

Plaintiff Stone

17. Petty Officer First Class Brock Stone is a 34-year-old man.

18. Petty Officer Stone is assigned to a unit at Fort Meade, Maryland through at least August 2020, and resides off-base with his wife in Anne Arundel County.

19. Petty Officer Stone has served in the U.S. Navy for 11 years, including a nine-month deployment to Afghanistan. Petty Officer Stone was awarded an achievement medal in connection with his deployment, and has received multiple other commendations, including a flag letter of commendation and multiple recommendations for early promotion. He has received extensive and costly training and is skilled in his field. He plans to serve until he completes 20 years of active duty service time. His current contract expires in 2023, and if he is not able to reenlist he will not be able reach that goal.

20. Petty Officer Stone is transgender.

21. Petty Officer Stone publicly revealed his transgender status to military personnel following, and in reliance upon, DoD's June 2016 Open Service Directive.

22. Pursuant to his evaluation by DoD medical personnel, Petty Officer Stone receives hormones as a medically necessary part of his gender transition.

23. Since arriving at Fort Meade in July 2017, Petty Officer Stone has received medically necessary treatment related to his gender transition at Walter Reed National Military Medical Center in Bethesda, Maryland. He was close to finalizing a medical treatment plan that included surgery at the time he was transferred to Fort Meade.

24. Before President Trump issued his Transgender Service Member Ban, Petty Officer Stone planned and expected that his treatment plan at Fort Meade would include medically necessary surgery in 2018. Despite months of effort by Petty Officer Stone, his treatment plan has yet to be fully approved.

25. Petty Officer Stone is a member of the ACLU of Maryland.

Plaintiff Cole

26. Staff Sergeant Kate Cole is a 27-year-old woman.

27. Staff Sergeant Cole is currently stationed at Fort Polk, Louisiana. She recently completed Drill Sergeant School, and is scheduled to complete a transfer to Fort Benning, Georgia in the coming month, where she will begin serving as a Drill Sergeant

28. Staff Sergeant Cole has served in the U.S. Army for approximately ten years, including a one-year deployment to Afghanistan where she served as a team leader and designated marksman. Staff Sergeant Cole intends to serve until she completes 20 years of active duty service time. Her current contract expires in 2021, and if she is not able to reenlist she will not be able to reach that goal.

29. Staff Sergeant Cole is transgender.

30. Staff Sergeant Cole publicly revealed her transgender status to military personnel following, and in reliance upon, DoD's June 2016 Open Service Directive.

31. Pursuant to her evaluation by DoD medical personnel, Staff Sergeant Cole is receiving hormones as a medically necessary part of her gender transition and has undergone medically necessary surgery.

32. Staff Sergeant Cole's treatment plan includes additional, medically-necessary surgical care related to her transition in the future. She is currently awaiting the completion of her transfer to Fort Benning in order to plan that care, so as to be consistent with her responsibilities in her new command.

Plaintiff Doe 1

33. Staff Sergeant John Doe 1 (referred to as Senior Airman John Doe in the First Amended Complaint) is a 25-year-old man.

34. He was recently promoted to his current rank from Senior Airman.

35. Staff Sergeant Doe 1 is in the process of transferring to Luke Air Force Base in Arizona, where he will officially start in June 2018.

36. Staff Sergeant Doe 1 has served for approximately six years on active duty in the U.S. Air Force, where he is pursuing cryogenics certification. He was awarded "Airman of the Year" for his flight. He plans to serve until he reaches 20 years of active duty service time. His current service contract ends in 2021, and if he is not able to reenlist he will not be able to reach that goal.

37. Staff Sergeant Doe 1 has deployed to Qatar for a six-month deployment.

38. Staff Sergeant Doe 1 is transgender.

39. Staff Sergeant Doe 1 publicly revealed his transgender status to military personnel following, and in reliance upon, DoD's June 2016 Open Service Directive.

40. Pursuant to his evaluation by DoD medical personnel, Staff Sergeant Doe 1 receives hormones as a medically necessary part of his gender transition, and has undergone medically necessary surgery. He does not currently anticipate requiring any further surgery related to his transition.

Plaintiff George

41. Airman First Class Seven Ero George is a 41-year-old man.

42. Airman First Class George is stationed at Selfridge Air National Guard Base, Michigan.

43. Airman First Class George is in the Air National Guard, where he serves in the base security force. He is also a member of the base Honor Guard, performing military funeral honors for deceased veterans, retirees, and active duty members; providing dignified transfers; and performing color guard details.

44. Airman First Class George is transgender.

45. Airman First Class George publicly revealed his transgender status to military personnel following, and in reliance upon DoD's June 2016 Open Service Directive.

46. Airman First Class George receives hormones as a medically necessary part of his gender transition and has undergone medically necessary surgery.

47. Airman First Class George intends to pursue a commission in the U.S. Army Nurse Corps. He has completed one civilian degree in nursing, works as a nurse, and is pursuing a second degree in the same field.

48. Airman First Class George is currently eligible for a commission under the Open Service Directive: (1) he has been stable without clinically significant distress or impairment as the result of gender dysphoria in social, occupational, or other important areas of functioning for more than 18 months; (2) he has completed all medical treatment associated with his gender transition, been stable in his preferred gender for more than 18 months, and has been stable on cross-sex hormones post-gender transition for more than 18 months; and (3) more than 18 months has elapsed since the date of his most recent surgery and no functional limitations or complications persist, nor is any additional surgery required. Airman First Class George has been attempting to update his gender marker in the U.S. military's personnel database, but the process has been repeatedly delayed for unexplained reasons. Airman First Class George plans to apply for a commission without an updated gender marker during the next application cycle, which begins in May, 2018.

Plaintiff Gilbert

49. Petty Officer First Class Teagan Gilbert is a 31-year-old woman.

50. Petty Officer Gilbert is a reservist stationed in Phoenix, Arizona.

51. Petty Officer Gilbert has served in the U.S. Navy for more than 13 years, including a one-year deployment to Afghanistan. She is currently in the Naval Reserve working as an information and space systems technician.

52. Petty Officer Gilbert is transgender.

53. Petty Officer Gilbert publicly revealed her transgender status to military personnel following, and in reliance upon, DoD's June 2016 Open Service Directive.

54. Pursuant to her evaluation by DoD medical personnel, Petty Officer Gilbert receives hormones as a medically necessary part of her gender transition and plans to seek approval for medically indicated surgical treatment in the future.

55. Petty Officer Gilbert has approximately one year of course work left in her undergraduate degree at Arizona State University, after which she intends to apply to commission as an officer.

56. Petty Officer Gilbert's goal is to serve in the military for at least 20 years.

Plaintiff Parker

57. Technical Sergeant Tommie Parker is a 54-year-old woman.

58. Technical Sergeant Parker is stationed at Stewart Air National Guard Base, New York and has served in the Marine Corps for four years and the Air National Guard for 26 years, including deployments to Okinawa (with the Marine Corps) and Germany (with the Air National Guard). Her Air National Guard service time includes twelve years and counting on active duty. It is Technical Sergeant Parker's goal to serve in the military for at least 20 years of active duty service time. She now works as a fuel technician.

59. Technical Sergeant Parker is transgender.

60. Technical Sergeant Parker publicly revealed her transgender status to military personnel following, and in reliance upon, DoD's June 2016 Open Service Directive.

61. Pursuant to her evaluation by DoD medical personnel, Technical Sergeant Parker receives hormones as a medically necessary part of her gender transition.

Plaintiff Teddy D'Atri

62. Plaintiff Teddy D'Atri is a 21-year-old man.

63. Plaintiff D'Atri currently works at an electronics store.

64. Plaintiff D'Atri is seeking to enlist in the Air Force, where he hopes to work as either an aerial gunner or in the security force. He has been actively working with a recruiter since July 2017. Due in part to the confusion and uncertainty with certain recruiters regarding the operative policy on transgender enlistees, Plaintiff D'Atri switched recruiters in October 2017.

65. Plaintiff D'Atri is transgender.

66. Plaintiff D'Atri has received hormones as a medically necessary part of his gender transition since August 2017. In connection with his gender transition, he is currently pursuing medically indicated surgery, which he anticipates undergoing in August 2018. He intends to enlist as quickly as possible following that surgery.

67. Plaintiff D'Atri is currently in the process of updating his civilian paperwork to reflect his male gender. He intends to submit paperwork to update his gender marker with both the DMV and the Social Security Administration.

68. Plaintiff D'Atri intends to seek a waiver through the process afforded by the Open Service Directive to either waive or reduce the 18-month periods to enlist, in whole or in part, and has been advised by his recruiter that he is eligible for such a waiver.

Plaintiff Wood

69. Plaintiff Ryan Wood is a 24-year-old man.

70. Plaintiff Wood currently works as a firefighter and is certified as both a firefighter and an emergency medical technician.

71. Plaintiff Wood is seeking to enlist in the Marine Corps. He initiated the enlistment process in January of this year, immediately after the ban on accessions was lifted. Since then, he has been actively working with his recruiter and medical professionals to provide all of the necessary documentation to be medically cleared for service.

72. Plaintiff Wood is transgender.

73. Plaintiff Wood has received hormones as a medically necessary part of his gender transition for approximately seven years and had medically indicated surgery in connection with his transition in 2012. He does not anticipate requiring any further surgical treatment in connection with his gender transition.

74. Plaintiff Wood meets the requirements for enlistment under the Open Service Directive. Plaintiff Wood has (1) been stable without clinically significant distress or impairment as the result of gender dysphoria in social, occupational, or other important areas of functioning for more than 18 months; (2) has completed all medical treatment associated with his gender transition, been stable in his preferred gender for more than 18 months, and has been stable on cross-sex hormones post-gender transition for more than 18 months; and (3) more than 18 months has elapsed since the date of his most recent surgery and no functional limitations or complications persist, nor is any additional surgery required.

Plaintiff Branco

75. Plaintiff Niko Branco is a 24-year-old man.

76. Plaintiff Branco currently works as an animal control officer for a police department.

77. Plaintiff Branco intends to enlist in the Army, and has been working toward that goal since before President Trump announced the Ban on July 26, 2017. Due to uncertainty over the scope of the Ban, Plaintiff Branco put these attempts on hold following its announcement, but has been actively working with a recruiter since the lifting of the accessions ban at the beginning of 2018. He recently resubmitted his medical paperwork in order to pursue enlistment and is awaiting a final date for undergoing a physical examination and signing an enlistment contract.

78. Plaintiff Branco is transgender.

79. Plaintiff Branco publicly revealed his transgender status to family and friends approximately six years ago. He has received hormones as a medically necessary part of his gender transition for approximately three and a half years, and underwent medically indicated surgery in connection with his transition two years ago. He does not anticipate requiring any further surgical treatment in connection with his gender transition.

80. A licensed medical provider would certify that: (1) Plaintiff Branco has been stable without clinically significant distress or impairment as the result of gender dysphoria in social, occupational, or other important areas of functioning for 18 months; (2) Plaintiff Branco has completed all medical treatment associated with his gender transition, has been stable in his preferred gender for 18 months, and has been stable on cross-sex hormones post-gender transition for 18 months; and (3) more than 18 months has elapsed since the date of his most recent surgery and no functional limitations or complications persist, nor is any additional

surgery required. Accordingly, Plaintiff Branco meets the requirements for enlistment under the Open Service Directive.

81. Plaintiff Branco has changed his gender marker on his birth certificate.

82. Plaintiff Branco's goal is to serve in the Army in for 20 years.

Plaintiff Doe 2

83. Plaintiff John Doe 2 is a 24-year old man.

84. Plaintiff Doe 2 currently works as a package handler for a shipping company.

85. Plaintiff Doe 2 is seeking to enlist in the Air Force. He has been working with a recruiter since January 2018.

86. Plaintiff Doe 2 is transgender.

87. Plaintiff Doe 2 has received hormones as a medically necessary part of his gender transition for approximately six years. He had medically indicated surgery in connection with his transition approximately one year ago. He does not currently anticipate requiring any further surgical treatment in connection with his gender transition.

88. Plaintiff Doe 2 is actively seeking a waiver through the process afforded by the Open Service Directive to either waive or reduce the 18-month stability period to enlist, in whole or in part, in his individual case for applicable reasons.

89. Plaintiff Doe 2 has updated his civilian paperwork to reflect his male gender, including his passport, driver's license, and paperwork with Social Security Administration. He has not updated his birth certificate due to a legal prohibition on doing so in his birth state.

Plaintiff Roe 1

90. Plaintiff Jane Roe 1 is a 27-year-old woman.

91. Plaintiff Roe 1 currently works at a coffee shop.

92. Plaintiff Roe 1 is transgender.

93. Plaintiff Roe 1 is seeking to enlist in the Air Force. She hopes to work in para-rescue and fire protection. Plaintiff Roe 1 has actively been seeking enlistment since early January 2018. After initially being informed by a recruiter that she should wait to enlist until the Department of Defense's policy on transgender enlistment was clarified, Plaintiff Roe 1 once again engaged a recruiter upon learning that a transgender individual had successfully enlisted.

94. Due in part to the confusion displayed by military recruiters regarding the current policy on transgender enlistees, Plaintiff Roe 1 has temporarily halted her attempts to enlist in order to prepare for her upcoming surgery. Plaintiff Roe 1 fully intends to resume her efforts to enlist in the U.S. military once her surgery is complete.

95. Plaintiff Roe 1 revealed her transgender identity to family and friends approximately nine years ago. She has received hormones as a medically necessary part of her gender transition for approximately eight and a half years. She underwent medically indicated surgery in connection with her transition on April 11, 2018, and is scheduled to have an additional surgery in two and a half months. After that upcoming surgery, she does not anticipate requiring any further surgical treatment in connection with her transition.

96. Plaintiff Jane Roe 1 intends to request a waiver through the process afforded by the Open Service Directive to either waive or reduce the 18-month periods to enlist, in whole or in part, in her individual case for applicable reasons.

Plaintiff John Doe 3, by his Next Friends and Mother and Father Jane Roe 2 and John Doe 4

97. Plaintiff John Doe 3 is a 15-year-old boy. He is represented in this action by Jane Roe 2 and John Doe 4 as his mother and father and next friends.

98. Plaintiff Doe 3 is transgender.

99. Plaintiff Doe 3 revealed to his family that he was transgender in January 2018. He has been undergoing therapy and is in the process of initiating the use of hormone blockers as a medically necessary part of his gender transition.

100. Plaintiff Doe 3 intends to join the Coast Guard when he becomes of age, either by applying to the Coast Guard Academy or simply by enlisting.

101. Plaintiff Doe 3 intends to update his civilian documentation to reflect his male gender in the coming year.

102. Plaintiff Doe 3's parents, Jane Roe 2 and John Doe 4, support his plan to enlist in the Coast Guard, and have authorized his participation in this lawsuit.

Plaintiff ACLU of Maryland

103. Plaintiff American Civil Liberties Union of Maryland, Inc. ("ACLU of Maryland") is an affiliate of the American Civil Liberties Union, a non-profit, nationwide, nonpartisan membership organization with over 1,500,000 members.

104. Plaintiff ACLU of Maryland's growing membership comprises over 42,000 Maryland members, including one or more men and women who are transgender and either currently serve in the U.S. military or intend to volunteer for service in the U.S. military.

105. The ACLU of Maryland litigates cases in which government officials have attempted to discriminate against men and women who are transgender, and therefore the ACLU of Maryland has a direct interest in challenging the ban at issue in this case.

106. The ACLU of Maryland's interest in protecting both its members and other men and women who are transgender from discrimination on the basis of sex and transgender status is

both germane and fundamental to the organization's purpose of furthering the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws.

Defendants

107. Defendant Donald J. Trump is the President of the United States. He is sued in his official capacity. In that capacity, he issued the Transgender Service Member Ban on August 25, 2017, and the memorandum of March 23, 2018.

108. Defendant James Mattis is the Secretary of Defense and is sued in his official capacity. DoD is responsible for providing the military forces needed to deter war and protect the security of the United States. At all times relevant to this Complaint, Defendant Mattis was acting as an employee and agent of the United States. In that capacity, Defendant Mattis is responsible for supervising the branches of the U.S. Armed Forces; for promulgating, implementing, and enforcing the policies and regulations that govern military service in all branches of the U.S. Armed Forces; and for ensuring the legality of these policies and regulations. In this role, he is responsible for the maintenance and enforcement of Department of Defense Instruction ("DoDI") 1300.28, which establishes DoD policies regarding transgender service members. In his official capacity, Defendant Mattis provided Defendant Trump with the report and recommendations that underlie the March 23 memorandum and the Implementation Plan.

109. Defendant Mark Esper is the Secretary of the Army and is sued in his official capacity. The Department of the Army is the DoD branch that defends the land mass of the United States, its territories, commonwealths, and possessions. At all times relevant to this Complaint, Defendant Esper was acting as an employee and agent of the United States. In that capacity, Defendant Esper has overall responsibility for the Army and for the Army's

development, administration, and enforcement of policies and regulations that affect service by transgender service members. These policies and regulations include Army publications and directives implementing DoD policy governing transgender service members.

110. Defendant Richard Spencer is the Secretary of the Navy and is sued in his official capacity. The Department of the Navy is the DoD branch that maintains, trains, and equips combat-ready maritime forces. At all times relevant to this Complaint, Defendant Spencer was acting as an employee and agent of the United States. In that capacity, Defendant Spencer has overall responsibility for the Navy and Marine Corps and those services' development, administration, and enforcement of policies and regulations that affect service by transgender service members. These policies and regulations include Navy and Marine Corps publications and directives implementing DoD policy governing transgender service members.

111. Defendant Heather Wilson is the Secretary of the Air Force and is sued in her official capacity. The Department of the Air Force is the DoD branch that provides the U.S. military with air and space capability. At all times relevant to this Complaint, Defendant Wilson was acting as an employee and agent of the United States. In that capacity, Defendant Wilson has overall responsibility for the Air Force and for the Air Force's development, administration, and enforcement of policies and regulations that affect service by transgender service members. These policies and regulations include Air Force publications and directives implementing DoD policy governing transgender service members.

112. Defendant Kirstjen Nielsen is the Secretary of Homeland Security and is sued in her official capacity. The Department of Homeland Security is responsible for the United States Coast Guard. At all times relevant to this Complaint, Defendant Nielsen was acting as an employee and agent of the United States. In that capacity, Defendant Nielsen is responsible for

supervising the Coast Guard; for promulgating, implementing, and enforcing the policies and regulations that govern military service in the Coast Guard; and for ensuring the legality of these policies and regulations. In this role, she is responsible for the maintenance and enforcement of all policies regarding transgender members of the Coast Guard. In her official capacity, Defendant Nielsen consulted with Defendant Mattis on the recommendations that underlie the March 23 memorandum and the Implementation Plan, and agreed with them.

113. Defendant Admiral Paul Zukunft is the Commandant of the Coast Guard and is sued in his official capacity. The Coast Guard is the branch of the U.S. Armed Forces responsible for maritime homeland security, but also has a peacetime role of maritime law enforcement. At all times relevant to this Complaint, Defendant Zukunft was acting as an employee and agent of the United States. In that capacity, Defendant Zukunft has overall responsibility for the Coast Guard and for the Coast Guard's development, administration, and enforcement of policies and regulations that affect service by transgender service members. These policies and regulations include Coast Guard publications and directives implementing any policy governing transgender service members.

JURISDICTION AND VENUE

114. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the action arises under the United States Constitution, the laws of the United States, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02.

115. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e)(1) because Plaintiff Stone and Plaintiff ACLU of Maryland reside in this District, and because a substantial part of the events or omissions giving rise to this action occurred and are occurring in this District.

FACTUAL ALLEGATIONS

A. Current Military Service by Men and Women Who Are Transgender

116. Transgender Americans have served, and continue to serve, in the military with distinction, including in combat. As of May 2014, the Williams Institute at UCLA School of Law estimated that men and women who are transgender account for approximately 8,800 active members of the U.S. Armed Forces. This figure may be even higher today in light of DoD's June 2016 Open Service Directive regarding transgender service.

117. According to General Mark Milley, Chief of Staff for the Army, he has seen "precisely zero reports of issues of cohesion, discipline, morale, and all sorts of things" with respect to current military service of transgender men and women. Senate Armed Services Committee Holds Hearing on the Fiscal 2019 Budget Request for the Army Department, CQ Congressional Transcripts, p. 92 (Apr. 12, 2018).

118. Admiral John M. Richardson, Chief of Naval Operations, and General Robert Neller, Commandant of the Marines, reported that they were not aware of any issues of unit cohesion, disciplinary problems, or morale related to the open service of transgender men and women. Senate Armed Services Committee Holds Hearing on Navy Posture, CQ Congressional Transcripts, pp. 77-78 (Apr. 19, 2018). General Neller confirmed that all the transgender Marines he has met "were ready and prepared to deploy." *Id*. at p. 79.

119. Defendant Paul Zukunft, the Commandant of the U.S. Coast Guard, testified to Congress that all 17 transgender members of the Coast Guard are "carrying out the full scope of missions that we execute around the world today," that the Coast Guard is "committed to their continued service," and that the transgender members of the Coast Guard are "serving today with a passion to serve in an all voluntary service, and they're hitting the ball out of the park." House

Appropriations Subcommittee on Homeland Security Holds Hearing on the Coast Guard Fiscal 2019 Budget Request, CQ Congressional Transcripts, p. 56 (Apr. 17, 2018).

120. Men and women who are transgender also serve openly in civilian roles supporting the U.S. military, including as contractors in combat zones.

B. Medical Treatment for Transgender Service Members

121. Pursuant to DoDI 1300.28 (§ 1.2(a)), "[t]ransgender persons . . . are subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming standards, deployability, and retention."

122. The American Psychiatric Association and every other major mental health organization recognize that being transgender is not a mental disorder and implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.

123. Some men and women who are transgender, however, experience "gender dysphoria," a diagnostic term used to describe the incongruence between a person's gender identity and the gender that they were assigned at birth where such incongruence is accompanied by clinically significant distress.

124. As with all medical conditions, varying courses of treatment for gender dysphoria may be medically necessary depending on the needs of the individual, as determined in consultation with medical professionals. These treatments, often referred to as transition-related care, may include social role transition, hormones, and surgery (sometimes called "sex reassignment surgery" or "gender confirmation surgery"). The goal of the treatment is to align an individual's outward expression of gender, body, and biochemistry with the person's gender identity in order to eliminate the clinically significant distress.

125. According to every major medical organization and the overwhelming consensus among medical experts, treatments for gender dysphoria, including surgical procedures, are

effective, safe, and medically necessary when clinically indicated to alleviate the distress caused by the condition.

126. In accordance with that medical consensus and contemporary standards of care, Medicare, Medicaid, and private insurance policies across the country routinely cover transition-related care as medically necessary treatment.

127. The medical needs of transgender service members with gender dysphoria are not materially different from those of other service members. For example, the military provides routine psychological care to all service members around the globe, including men and women who are transgender. It also provides long-term hormone treatments for persons with diabetes and other endocrine disorders, and stocks cross-sex hormones in its dispensaries in the United States and abroad. The military further provides medically-indicated surgery to all service members, including chest and breast reconstruction, hysterectomy, and genital reconstruction, among other procedures that might be prescribed to treat gender dysphoria.

C. History of DoD Policy on Transgender Military Service

1) Historical Regulatory Ban

128. Starting some time before 1981, DoD maintained and enforced a policy barring men and women who are transgender from enlisting or being retained in the U.S. Armed Forces.

129. That policy prohibited men and women who are transgender from serving openly, whether or not they required any ongoing medical treatment and even if they were fit to serve. In contrast, non-transgender individuals, including those requiring medical interventions, were allowed to remain in military service if they could demonstrate their fitness to serve.

130. Neither the policy nor the various service branch regulations that implemented it articulated a rationale for presuming that being transgender renders a service member administratively unfit.

2) DoD Revisits and Studies the Regulations Regarding Transgender Military Service

131. On July 13, 2015, then-Secretary of Defense Ashton Carter issued two directives aimed at updating DoD's existing transgender service member regulations, which the Secretary described as "an outdated, confusing, inconsistent approach that's contrary to our value of service and individual merit" that is "causing uncertainty that distracts commanders from our core missions." *Statement by Secretary of Defense Ash Carter on DOD Transgender Policy*, DoD (July 13, 2015), https://www.defense.gov/News/News-Releases/News-Release-View/Article/612778/.

132. The Secretary's first directive established a working group to study "the policy and readiness implications of welcoming transgender persons to serve openly." The Acting Under Secretary of Defense for Personnel and Readiness led the group, which was comprised of leaders from the armed services; the Joint Staff; the service secretaries; and personnel, training, readiness and medical specialists from across DoD (with input from transgender service members, outside expert groups, and medical professionals outside the department).

133. The Secretary's second directive ordered that "decision authority in all administrative discharges for those diagnosed with gender dysphoria or who identify themselves as transgender be elevated to" the Under Secretary, "who will make determinations on all potential separations."

134. From July 2015 to June 2016, members of the working group and other senior leaders in DoD met with transgender service members deployed throughout the world, including individuals serving on aircrafts, submarines, and operating bases, as well as at the Pentagon. These individuals were determined to be high-quality additions to the U.S. Armed Forces, and DoD leaders observed that the ambiguity of existing regulations regarding the service of

transgender individuals put both the service members and their commanders in a difficult and fundamentally unfair position.

135. The DoD working group also carefully examined medical, legal, and policy considerations associated with permitting transgender service members to serve openly in the Armed Forces. The working group reviewed data, studied the many allied militaries that already permit transgender service members to serve openly, and considered analogous examples from the public and private sectors in the United States. DoD observed, among other things, that the provision of medical care for men and women who are transgender is becoming common and normalized in public and private sectors alike.

136. In conjunction with its working group efforts, DoD commissioned the RAND Corporation to analyze relevant data and studies to assist with DoD's own review. RAND's work was "sponsored by the Office of the Under Secretary of Defense for Personnel and Readiness and conducted within the Forces and Resources Policy Center of the RAND National Defense Research Institute, a federally funded research and development center sponsored by the Office of the Secretary of Defense, the Joint Staff, the Unified Combatant Commands, the Navy, the Marine Corps, the defense agencies, and the defense Intelligence Community." Agnes Gereben Schaefer et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, RAND Corporation, at iii–iv (2016) (hereinafter, "RAND Report," attached as **Exhibit A** to Plaintiffs' original Complaint), ECF 1-2.

137. Based on various factors, including its analysis of allied militaries and the expected rate at which American transgender service members would require medical treatment that would impact their fitness for duty or deployability, RAND concluded that there would be "minimal" readiness impacts from allowing transgender service members to serve openly. *See id*.

at xii, 2–3. Specifically, RAND estimated that 10 to 130 active component members each year could have reduced deployability as a result of gender transition-related treatments. This amount is negligible relative to the 102,500 non-deployable soldiers in the Army alone in 2015, 50,000 of them in the active component. *Impact of Transgender Personnel on Readiness and Health Care Costs in the U.S. Military Likely to Be Small*, RAND Press Room (June 30, 2016), https://www.rand.org/news/press/2016/06/30.html.

138. RAND concluded that health care costs would represent "an exceedingly small proportion" of both Active Component and overall DoD health care expenditures. RAND Report, at xi–xii, 31. In so concluding, RAND observed that "[b]oth psychotherapy and hormone therapies are [already] available and regularly provided through the military's direct care system," and "[s]urgical procedures quite similar to those used for gender transition are already performed within the MHS for other clinical indications." *Id*. at 8. For instance, "[r]econstructive breast/chest and genital surgeries are currently performed on patients who have had cancer, been in vehicular and other accidents, or been wounded in combat." *Id*.

3) Decision to Permit Transgender Service Members to be Subject to the Same Fitness Standards as Other Service Members

139. Based on input from the DoD's working group and the RAND Corporation, including information and recommendations from the service secretaries and other Pentagon officials, Secretary Carter issued a directive and memorandum to all military departments regarding military service for transgender service members on June 30, 2016. The Open Service Directive announced that, "[e]ffective immediately, no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity." Further, "[t]ransgender Service members will be subject to the same standards as any other Service member of the same gender." Thus, "[a] Service

member whose ability to serve is adversely affected by a medical condition or medical treatment related to their gender identity should be treated, for purposes of separation and retention, in a manner consistent with a Service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition." The Open Service Directive is attached as **Exhibit B** to Plaintiffs' original Complaint, ECF 1-3.

140. Citing the RAND Report, the Secretary of Defense explained the three principal reasons underlying the Open Service Directive: (1) the military's need to "avail ourselves of all talent possible" in order to remain "the finest fighting force the world has ever known"; (2) the Secretary's duty to transgender service members and their commanders to "provide them both with clearer and more consistent guidance than is provided by current policies"; and (3) as a matter of principle, "Americans who want to serve and can meet our standards should be afforded the opportunity to compete to do so." *Department of Defense Press Briefing by Secretary Carter on Transgender Service Policies in the Pentagon Briefing Room* (June 30, 2016), https://www.defense.gov/News/Transcripts/Transcript-View/Article/822347/departmentof-defense-press-briefing-by-secretary-carter-on-transgender-service/.

141. The Open Service Directive was to be implemented over the course of a 12-month period, from June 2016 to June 2017. Although transgender service members already in the military on June 30, 2016 were allowed to serve openly as soon as the Open Service Directive took effect, accession of transgender personnel—that is, the process of bringing new enlisted recruits and officer candidates into the military—did not begin immediately. The Policy gave the Department of Defense and the military services approximately one year to conduct training, and to start accepting transgender members into the military beginning on July 1, 2017.

142. The enlistment requirements were stringent, providing, inter alia, that a history of gender dysphoria was disqualifying unless a licensed medical provider certified that the applicant had been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.

143. On September 30, 2016, DoD issued an "Implementation Handbook" to "assist our transgender Service members in their gender transition, help commanders with their duties and responsibilities, and help all Service members understand [Department] policy [allowing] the open service of transgender Service members." *Transgender Service in the U.S. Military: An Implementation Handbook*, DoD, at 8 (Sept. 30, 2016), *available at* https://www.defense.gov/Portals/1/features/2016/0616_policy/DoDTGHandbook_093016.pdf?ver=2016-09-30-160933-837. The Handbook explained to transgender service members that DoD's revised transgender service member policy "ensures your medical care is brought into the military health system (MHS), protects your privacy when receiving medical care, and establishes a structured process whereby you may transition gender when medically necessary." *Id*. at 17. The Handbook encouraged transgender service members to be "open and honest with your leadership when discussing the gender transition process," and further encouraged transgender service members to disclose their transgender status to colleagues. *Id*. at 20.

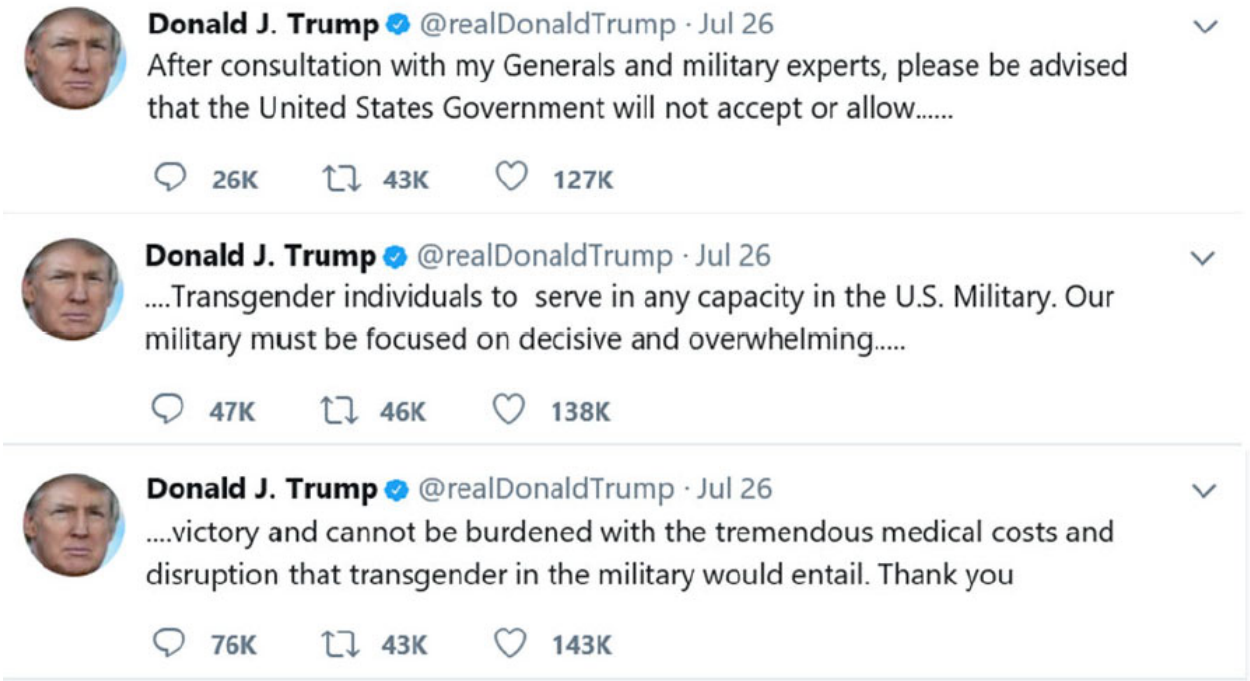
144. The Handbook also provided guidance to commanders and non-transgender service members. *Id*. at 25–33. The topics in the Handbook include an overview of the gender transition approval process; guidance specific to transgender service members, commanders, and non-transgender service members, including communication, medical care, deployment and physical fitness, and privacy; frequently asked questions and answers; various potential scenarios and guidance on how to address them; and resources for further information. *See generally id*.

145. Implementation training began shortly after the policy was announced. This training involved commanders, medical personnel, the operating forces, and recruiters. The training was directed to the entire joint force, in the United States and around the world.

146. During this same timeframe, each of the service branches conducted a comprehensive review of regulations governing medical care, administrative separations, and manpower management, in order to ensure that service-level issuances were consistent with the DoD instructions.

D. Twitter Announcement of Categorical Ban on Service by Men and Women Who Are Transgender

147. On the morning of July 26, 2017, President Trump posted the following announcement on Twitter, under the handle @realDonaldTrump:



148. The Trump Administration has provided no evidence that this about-face in policy was supported by any study of the issue or any consultation with military officers, DoD officials, other military experts, or medical or legal experts.

149. Press reports indicate that President Trump's motivations in abruptly announcing a transgender ban were largely political, reflecting a desire to placate legislators and advisers who bear animus and moral disapproval toward men and women who are transgender. Rachel Bade & Josh Dawsey, *Inside Trump's Snap Decision to Ban Transgender Troops*, Politico (July 26, 2017, 2:07 PM), http://www.politico.com/story/2017/07/26/trump-transgender-military-ban-behind-the-scenes-240990; *see also, e.g.*, Tom Porter, *Transgender Military Ban: The Rise of Anti-LGBT Hate Groups in Trump's White House*, Newsweek (July 26, 2017, 12:47 PM), http://www.newsweek.com/anti-lgbt-hate-groups-transgender-military-ban-trump-642218; Asawin Suebsaeng et al., *Trump Bows to Religious Right, Bans Trans Troops*, The Daily Beast (July 26, 2017, 12:33 PM), http://www.thedailybeast.com/trump-bows-to-religious-right-bans-trans-troops.

150. According to subsequent media reports, "President Donald Trump's White House and Defense Department lawyers had warned him against the transgender military ban for days" and were "startl[ed]" when they "learned of the change in a series of tweets." Josh Dawsey, *John Kelly's Big Challenge: Controlling the Tweeter in Chief*, Politico (Aug. 4, 2017, 6:03 PM), http://www.politico.com/story/2017/08/04/trump-john-kelly-challenge-twitter-241343.

151. President Trump's actions immediately caused the Serving Plaintiffs and other transgender service members to fear for their careers, the well-being of their family members and dependents, their health care and, in some cases, their safety.

152. The President's actions were also experienced by the Serving Plaintiffs as a betrayal, in light of their actions to come out publicly to military personnel in reliance on the June 2016 directive.

153. Close to 60 retired generals and flag officers from various military branches also found President Trump's tweet to undermine national security and military readiness, stating:

> This proposed ban, if implemented, would cause significant disruptions, deprive the military of mission-critical talent, and compromise the integrity of transgender troops who would be forced to live a lie . . . The military conducted a thorough research process on this issue and concluded that inclusive policy for transgender troops promotes readiness. . . . We could not agree more.

Fifty-Six Retired Generals and Admirals Warn that President Trump's Anti-Transgender Tweets, if Implemented, Would Degrade Military Readiness, Palm Ctr. (Aug. 1, 2017), http://www.palmcenter.org/fifty-six-retired-generals-admirals-warn-president-trumps-anti-transgender-tweets-implemented-degrade-military-readiness/.

154. Members of Congress were similarly "troubled" by President Trump's tweet on a bipartisan basis, with one Republican lawmaker (and former Navy SEAL) issuing the following statement:

> I am troubled that [DoD] seemed to be unaware of this potential policy change and how it was made public. I understand the DoD is in the middle of a review of relevant policies and I believe this ban is premature. There are heroic military members willing to put their lives on the line and give the ultimate sacrifice on our behalf, regardless of their gender identity. I support the ability for those who meet all military requirements, medical and otherwise, to have the opportunity to serve our great country.

See Rep. Scott Taylor (R-Va.), *Statement on Trump Transgender Ban* (July 26, 2017), https://taylor.house.gov/media/press-releases/statement-trump-transgender-ban.

155. Senator John McCain, Chairman of the Senate Committee on Armed Services; also repudiated President Trump's announcement, stating:

> The Department of Defense has already decided to allow currently-serving transgender individuals to stay in the military, and many are serving honorably today. Any American who meets current medical and readiness standards should be allowed to continue serving. There is no reason to force service members who are able to fight,

> train, and deploy to leave the military—regardless of their gender identity. We should all be guided by the principle that any American who wants to serve our country and is able to meet the standards should have the opportunity to do so—and should be treated as the patriots they are.

See Sen. John McCain (R-Ariz.), *Statement by SASC Chairman John McCain on Transgender Americans in the Military* (July 26, 2017), https://www.mccain.senate.gov/public/index.cfm/2017/7/statement-by-sasc-chairman-john-mccain-on-transgender-americans-in-the-military.

156. The Department of Defense declined comment on President Trump's policy announcement, referring questions to the White House.

157. The Secretary of Defense was on vacation at the time of President Trump's announcement on Twitter.

E. The Transgender Service Member Ban

158. Early Friday evening on August 25, 2017, President Trump issued his Transgender Service Member Ban in the form of a Memorandum for the Secretary of Defense and Secretary of Homeland Security. A copy is attached as **Exhibit C** to Plaintiffs' original Complaint, ECF 1-4.

159. The Transgender Service Member Ban stated that in President Trump's own "judgment," DoD's decision to adopt the Open Service Directive "failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects."

160. The Transgender Service Member Ban therefore "direct[ed]" the Secretary of Defense and the Secretary of Homeland Security "to return to the longstanding policy and

practice on military service by transgender individuals that was in place prior to June 2016," until President Trump is personally persuaded that a change is warranted. Transgender Service Member Ban § 1(b).

161. The Transgender Service Member Ban ordered that the policy banning enlistment of men and women who are transgender be extended, until a recommendation to the contrary is made "that I find convincing." *Id.* § 2(a). The Transgender Service Member Ban further ordered a "halt" to the use of DoD resources "to fund sex-reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex." *Id.* § 2(b).

162. The Transgender Service Member Ban specified that provisions banning men and women who are transgender from enlisting would take effect on January 1, 2018 (the date Defendant Mattis's directive delaying accessions was set to expire). It further provided that the provisions banning existing transgender service members from continued service and banning medically necessary health care would take effect on March 23, 2018. *Id.* § 3.

163. The Transgender Service Member Ban further directed the Secretary of Defense, in consultation with the Secretary of Homeland Security, to submit to President Trump by February 21, 2018, a plan to implement the Transgender Service Member Ban and "determine how to address transgender individuals currently serving in the United States military." *Id.* § 3.

164. The Transgender Service Member Ban gave the Secretary of Defense discretion to determine how to implement the Ban, but it did not leave discretion for the Secretary of Defense to determine whether to implement it.

F. Fundamental Contradiction Between Transgender Service Member Ban and DoD's Own Considered Conclusions

165. Although the Transgender Service Member Ban purported to be based on President Trump's "judgment," that judgment appears to reflect nothing more than uninformed speculation, myths, and stereotypes that have already been rebutted by an extensive and rigorous evidence-based process.

166. For example, as justification for the Transgender Service Member Ban, President Trump stated that allowing men and women who are transgender to continue serving would be disruptive. But the 2016 study commissioned by DoD found that a transgender service member's care would have a substantial impact on readiness *only* if (1) that service member worked in an "especially unique" military occupation, (2) that occupation was "in demand at the time of transition," *and* (3) the service member needed to be available for "frequent, unpredicted mobilizations." RAND Report, at 43. "Having completed medical transition, a service member could resume activity in an operational unit if otherwise qualified." *Id*. Upon information and belief, the DoD's own working group reached similar conclusions in 2016. The American Medical Association similarly adopted a resolution that "there is no medically valid reason to exclude transgender individuals from service in the [United States] military."

167. Former high-ranking military personnel have indicated that the Transgender Service Member Ban—not the Open Service Directive—will cause serious disruption to the Armed Forces. *See Fifty-Six Retired Generals and Admirals Warn that President Trump's Anti-Transgender Tweets, if Implemented, Would Degrade Military Readiness, supra* ("This proposed ban, if implemented, would cause *significant disruptions*, deprive the military of mission-critical talent, and compromise the integrity of transgender troops who would be forced to live a lie, as well as non-transgender peers who would be forced to choose between reporting their comrades

or disobeying policy. As a result, *the proposed ban would degrade readiness*[.]") (emphases added)).

168. President Trump has similarly invoked alleged concerns about "unit cohesion." The RAND study noted that "[t]he underlying assumption [of these alleged concerns] is that if service members discover that a member of their unit is transgender, this could inhibit bonding within the unit, which, in turn, would reduce operational readiness." *Id*. at 44.

169. To study the validity of this argument, RAND looked to, among other things, the experiences of foreign countries that permit open transgender military service. There are 18 such countries: Australia, Austria, Belgium, Bolivia, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, the Netherlands, New Zealand, Norway, Spain, Sweden, and the United Kingdom. Observing that "there has been no significant effect of openly serving transgender service members on cohesion, operational effectiveness, or readiness" in foreign militaries that permit open transgender service, and that "direct interactions with transgender individuals significantly reduce negative perceptions and increase acceptance," the RAND study concluded: "[W]e anticipate a minimal impact on readiness from allowing transgender personnel to serve openly." *Id*. at 44–45, 47. Upon information and belief, the DoD's own working group reached similar conclusions in 2016.

170. Senator Tammy Duckworth—an Iraq War Veteran, Purple Heart recipient and former Assistant Secretary of the Department of Veterans Affairs—has explained that the Transgender Service Member Ban, not the Open Service Directive, would "harm our military readiness":

> When I was bleeding to death in my Black Hawk helicopter after I was shot down, I didn't care if the American troops risking their lives to help save me were gay, straight, transgender, black, white or brown. All that mattered was they didn't leave me behind. If you

> are willing to risk your life for our country and you can do the job, you should be able to serve—no matter your gender identity or sexual orientation.

See Sen. Tammy Duckworth (D-Ill.), *Duckworth Statement on Reports Trump Administration Directing DOD to Discriminate Against Transgender Servicemembers* (Aug. 24, 2017), https://www.duckworth.senate.gov/news/press-releases/duckworth-statement-on-reports-trump-administration-directing-dod-to-discriminate-against-transgender-servicemembers.

171. Finally, President Trump claimed that allowing transgender service members to continue service would be too expensive. The RAND Report's study found to the contrary. Namely, "even in the most extreme scenario that we were able to identify using the private health insurance data, we expect only a 0.13-percent ($8.4 million out of $6.2 billion) increase in [active component] health care spending." RAND Report, at 36. By contrast, total military spending on erectile dysfunction medicines amounts to $84 million annually, which, on information and belief, is almost forty times the cost of gender dysphoria related medical care for active duty transgender service members in 2017. Patricia Kime, *DoD Spends $84M a Year on Viagra, Similar Meds*, Military Times (Feb. 13, 2015), http://www.militarytimes.com/pay-benefits/military-benefits/health-care/2015/02/13/dod-spends-84m-a-year-on-viagra-similar-meds/.

172. An August 2017 report by the Palm Center concluded that implementing the Transgender Service Member Ban would cost $960 million. *See* Aaron Belkin et al., *Discharging Transgender Troops Would Cost $960 Million*, Palm Center (Aug. 2017), *available at* http://www.palmcenter.org/wp-content/uploads/2017/08/cost-of-firing-trans-troops-3.pdf.

G. The Preliminary Injunctions

173. The six original Serving Plaintiffs and Plaintiff ACLU of Maryland filed the instant lawsuit on August 28, 2017, and filed a first amended complaint on September 14, 2017.

On November 21, 2017, this Court issued a preliminary injunction prohibiting the Defendants from taking any action to enforce the policies and directives encompassed in President Trump's August 25, 2017 Memorandum.

174. Three other district courts issued similar preliminary injunctions.

175. As a result of those injunctions, the Open Service policy remains in effect, and the military began accepting transgender recruits on January 1, 2018.

H. The Implementation Plan

176. On February 22, 2018, Secretary Mattis presented the President with his implementation plan, consisting of a short memo ("Implementation Memo") and an unsigned document entitled "Department of Defense Report and Recommendations on Military Service by Transgender Persons" totaling 44 pages (the "Implementation Report") (together "the Implementation Plan").

177. The Implementation Plan sets out a two-pronged approach to effectuate the President's ban on transgender individuals serving in the military. First, transgender individuals who "require or have undergone gender transition" are disqualified from military service. ECF 120-2 at 32. Second, all other transgender individuals may serve only "*in their biological sex*." Id. at 34 (emphasis added). Together, these provisions effectively exclude all transgender individuals from being able to enlist. Among other things, these provisions mean that transgender individuals may not serve in accordance with their gender identity or receive medically necessary transition-related care.

178. The Implementation Plan also contains a "grandfather" clause exemption, which permits service members diagnosed with gender dysphoria since the Open Service Directive took effect and prior to the effective date of the Implementation Plan to "continue to receive all medically necessary treatment, to change their gender marker in DEERS, and to serve in their

preferred gender." The Implementation Plan states that the grandfather clause "is and should be deemed severable from" the remainder of the policy "should [DoD's] decision to exempt these Service members be used by a court as a basis for invalidating the entire policy." Implementation Report at 43. There are questions about the extent of protection this exception to the Ban will provide to current service members who are transgender and who were diagnosed in the specified time period. The Implementation Plan does not explain how DoD and the military services intend to interpret and apply this exemption. On information and belief, some service members who are transgender are already being told that they may not reenlist.

179. On March 23, 2018, President Trump issued a new memorandum, acknowledging receipt of Secretary Mattis's implementation plan and authorizing Secretary of Defense and the Secretary of Homeland Security to proceed with the plans for implementation.

180. President Trump's March 23rd memorandum states that it "revoke[s] [President Trump's] memorandum of August 25, 2017." In fact, however, President Trump's March 23 memorandum is the next step in enforcing and implementing the Transgender Service Member Ban.

I. Reaction of the Medical Community

181. The Implementation Plan was quickly condemned by the mainstream medical community. On March 26, 2018, the American Psychological Association released a statement indicating it was "alarmed" by the Administration's "misuse of psychological science to stigmatize transgender Americans and justify limiting their ability to serve in uniform and access medically necessary healthcare." *See* Arthur C. Evans Jr., *APA Statement Regarding Transgender Individuals Serving in Military* (March 26, 2018), *available at* http://www.apa.org/news/press/releases/2018/03/transgender-military.aspx. The APA further stated that:

> Substantial psychological research shows that gender dysphoria is a treatable condition, and does not, by itself, limit the ability of individuals to function well and excel in their work, including in military service. The science is clear that individuals who are adequately treated for gender dysphoria should not be considered mentally unstable. […] No scientific evidence has shown that allowing transgender people to serve in the armed forces has an adverse impact on readiness or unit cohesion. What research does show is that discrimination and stigma undermine morale and readiness by creating a significant source of stress for sexual minorities that can harm their health and well-being.

Id.

182. On March 28, 2018, the Palm Center released a joint statement by former U.S. Surgeons General M. Joycelyn Elders and David Satcher, stating:

> We are troubled that the Defense Department's report on transgender military service has mischaracterized the robust body of peer-reviewed research on the effectiveness of transgender medical care as demonstrating 'considerable scientific uncertainty.' In fact, there is a global medical consensus that such care is reliable, safe, and effective. […] A wide body of reputable, peer-reviewed research has demonstrated to psychological and health experts that treatments for gender dysphoria are effective. Research on the effectiveness of medical care for gender dysphoria was the basis of the American Medical Association's 2015 resolution that 'there is no medically valid reason to exclude transgender individuals from service in the U.S. military,' and we expressed our support for the resolution at the time of its passage. In light of last week's announcement concerning military policy for transgender service members, we underscore that transgender troops are as medically fit as their non-transgender peers and that there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude them from military service or to limit their access to medically necessary care.

M. Joycelyn Elders and David Satcher, *Former Surgeons General Debunk Pentagon Assertions about Medical Fitness of Transgender Troops*, Palm Center (March 28, 2018), *available at* http://www.palmcenter.org/former-surgeons-general-debunk-pentagon-assertions-about-medical-fitness-of-transgender-troops/.

183. Expressing similar views, the American Medical Association on April 3, 2018 sent a letter to the Secretary of Defense on behalf of its members stating:

> We believe there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude transgender individuals from military service. Transgender individuals have served, and continue to serve, our country with honor, and we believe they should be allowed to continue doing so. […] We support the finding of the RAND study conducted for the Department of Defense on the impact of transgender individuals in the military that the financial cost is negligible and a rounding error in the defense budget. It should not be used as a reason to deny patriotic Americans an opportunity to serve their country. We should be honoring their service.

James L. Madara, Letter to The Honorable James N. Mattis on Behalf of the American Medical Association (April 3, 2018), *available at* https://searchlf.ama-assn.org/undefined/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2018-4-3-Letter-to-Mattis-re-Transgender-Policy.pdf.

J. Immediate and Irreparable Harm to the Serving Plaintiffs from the Transgender Service Member Ban

184. The Serving Plaintiffs and other transgender service members face immediate and irreparable harm as a result of the Transgender Service Member Ban, including as implemented through the Implementation Plan.

185. Serving Plaintiffs and other transgender service members now face the reality that, despite their years of commitment and training, their careers could prematurely end and various benefits could be made permanently unavailable. Terminating the active service of the Serving Plaintiffs and other transgender service members would also adversely affect their retirement benefits, and could in some cases preclude eligibility for retirement benefits altogether.

186. The purported "grandfather" exemption to the DoD's attempt to implement the Transgender Service Member Ban leaves the Serving Plaintiffs vulnerable. The grandfather exemption specifically states that the Defendants can withdraw it immediately under certain circumstances that are beyond the Serving Plaintiffs' control, and thus does not remove the irreparable harm the Serving Plaintiffs face. In addition, the Implementation Report cautions that transgender service members "may not be deemed to be non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months)" or may face removal from the military, without providing any detail as to how such policies will be interpreted and applied. *See* Implementation Report at 43. The Implementation Report's discussion of hormones suggests that transgender service members receiving hormones may be considered non-deployable, even though that is not how the military treats individuals prescribed hormones for other reasons. Therefore, even those transgender service members who are "protected" by the grandfather exemption are exposed to possible termination for arbitrary reasons related to their transgender status.

187. Plaintiff Petty Officer Stone has served in the U.S. Navy for 11 years, which included a nine-month deployment to Afghanistan. Petty Officer Stone was awarded an achievement medal in connection with his deployment, and he has received multiple other commendations, including a flag letter of commendation and multiple recommendations for early promotion. Despite this lengthy service and deployment, and the fact that he has received extensive and costly training in his field, he faces the prospect that he will be forced out of the U.S. Navy pursuant to the Transgender Service Member Ban.

188. Plaintiff Staff Sergeant Cole has served in the U.S. Army for nearly a decade, which included a one-year deployment to Afghanistan. Despite her lengthy service, experience

as a team leader, designated marksman, and Cavalry Scout, she faces the prospect that she will be forced out of the U.S. Army pursuant to the Transgender Service Member Ban.

189. Plaintiff Senior Airman Doe 1 has served for approximately six years in the U.S. Air Force, which included a deployment to Qatar. Despite his service and the fact that he was awarded "Airman of the Year" for his flight, he faces the prospect that he will be forced out of the U.S. Air Force pursuant to the Transgender Service Member Ban.

190. Plaintiff Airman First Class George has served in the Air National Guard for two and a half years and intends to pursue a commission in the U.S. Army. Despite his service as base security force, he may be prohibited from commissioning in the U.S. Army and faces the prospect that he will be forced out of the Air National Guard pursuant to the Transgender Service Member Ban.

191. Plaintiff Petty Officer Gilbert has served in the U.S. Navy for 13 years, which included a one-year deployment to Afghanistan. Despite her lengthy service and her specialized knowledge as an information and space systems technician, she faces the prospect that she will be forced out of the U.S. Navy pursuant to the Transgender Service Member Ban.

192. Plaintiff Technical Sergeant Parker has served in the U.S. Marine Corps for four years and the Air National Guard for 26 years, which included deployments to Japan and Germany. Despite her lengthy service, she faces the prospect that she will be forced out of the Air National Guard pursuant to the Transgender Service Member Ban.

193. In addition, many transgender service members, including Plaintiffs Stone, Cole, Doe 1, Gilbert, and Parker, may be denied medically necessary treatment that, in many cases, has already been recommended by military medical professionals.

194. While the Implementation Report claims that transgender service members who meet certain limited criteria relating to the date their gender dysphoria was diagnosed "may continue to receive all medically necessary [care]," the Implementation Report provides no details as to what will be considered "medically necessary" or the process that will govern requests for such care. In light of the Implementation Report's distortion of medical literature regarding the efficacy of care for gender dysphoria and rejection of the views of the mainstream medical community, it is unclear what care will still be provided.

195. Each transgender service member who is denied medically necessary treatment will suffer serious harm.

196. The Serving Plaintiffs may also face irreparable harm to their education as a result of the Transgender Service Member Ban and the Implementation Plan.

197. Plaintiff Cole currently benefits from the Army's tuition assistance, which permits her to take college classes through the University of Maryland - University College. If she is discharged, she will no longer be eligible for tuition assistance.

198. The Transgender Service Member Ban and the Implementation Plan may prevent Plaintiff Gilbert from being accepted to Officer Candidate School after finishing her coursework at Arizona State University.

199. The Serving Plaintiffs and other transgender service members also face extraordinary stress, uncertainty, and stigma from the ban on transgender individuals from open service and the singling out their medical care for a ban on coverage. While the Serving Plaintiffs and some other current service members may be covered by the "grandfather" exemption in the Implementation Plan, the scope of that protection is unclear and the clause is subject to severance. At any time, the exemption could be rescinded or disregarded, and the

military will be "authorized to discharge" every transgender service member. The stigma that the Serving Plaintiffs and other transgender service members face has been increased by the Implementation Report's use of stereotypes and conjecture to allege that persons with gender dysphoria, even after successful treatment, have higher rates of psychiatric needs, including the Implementation Report's treatment of gender dysphoria as a "psychiatric disorder" or "mental health condition." The Implementation Report even invites speculation whether transgender service members "can meet the standards for military duty," and suggests that decreases in military readiness can be blamed on transgender service members' medical needs, fueling anti-transgender sentiment.

200. Even as the Serving Plaintiffs wait for the Transgender Service Member Ban to be further implemented via the Implementation Plan and subsequent directives, they face significant uncertainty and concern about their careers and their futures, must plan for potential discharge, and experience the stigma of being told their service to their country is not valued or wanted, and that their medical care needs are not real or necessary.

K. Immediate and Irreparable Harm to the Enlisting Plaintiffs from the Transgender Service Member Ban

201. The Enlisting Plaintiffs and other transgender Americans who wish to join the U.S. military face immediate and irreparable harm as a result of the Transgender Service Member Ban, including as implemented through the Implementation Plan.

202. Each Enlisting Plaintiff and other potential recruits who are transgender will be denied the right to join the U.S. military solely based on characteristics associated with their transgender identity, regardless of whether they are capable of meeting enlistment standards. They have lost access to careers and opportunities that are available to all other Americans.

203. Plaintiffs D'Atri, Wood, Branco, Doe 2, Roe 1, and Doe 3, will all be barred entirely from serving openly in the military because they are transgender. Plaintiffs D'Atri, Wood, Branco, and Doe 2 are all actively engaged with discussions with recruiters and face the imminent harm of being denied the opportunity to enlist. Under the terms of the Open Service Directive, Plaintiffs Wood and Branco are currently eligible to enlist, and are not prohibited from enlisting due to either their gender identity or their medical history. Plaintiffs D'Atri and Doe 2 expect to be qualified over the anticipated life of this litigation.

204. Plaintiffs Roe 1 and Doe 3, while earlier in the process, each have a concrete plan to enlist in the military. Each of the Enlisting Plaintiffs would be disqualified from military service under the terms of the Implementation Plan.

LEGAL CLAIMS

COUNT I (Against All Defendants)

VIOLATION OF THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE

205. Plaintiffs re-allege and incorporate by reference as if fully set forth herein the allegations in all preceding paragraphs.

206. The equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution protects all persons, including members of the Armed Forces.

207. President Trump issued the Transgender Service Member Ban, directing that: (i) current policy providing that transgender status is not a basis for discharge is rescinded, and service members who are transgender are barred from serving in the U.S. Armed Forces, irrespective of their ability to demonstrate their fitness to serve (§ 1(b)); (ii) enlistment in the military or commissioning as an officer by men and women who are transgender is prohibited,

irrespective of their ability to demonstrate their fitness to serve, including the strict accession requirements adopted by DoD (§ 2(a)); and (iii) currently serving transgender service members are denied medically necessary surgical care, including in cases where individuals are stable in their gender transition and able to demonstrate their fitness to serve on the same basis as other service members (§ 2(b)).

208. In compliance with the directives of the Transgender Service Member Ban, the Department of Defense's Implementation Plan disqualifies transgender individuals from military service, subject to an uncertain "grandfather" exemption offering incomplete protection.

209. The policies set out in the Transgender Service Member Ban and the Implementation Plan violate Plaintiffs' right to equal protection.

i. Rescission of Protection Against Discharge of Existing Service Members (Directive Section 1(b) of the Ban)

210. Section 1(b) of the Transgender Service Member Ban directed the Secretary of Defense to "return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016," indefinitely. Section 1(a) described the policy being reinstated as one under which the military is "authorized [to] discharge" service members on the basis of their transgender status.

211. Section 1(b) thus established a broad ban on service by men and women who are transgender, with immediate and longer-term impacts on those currently serving.

212. Section 3 of the Transgender Service Member Ban required the Secretary of Defense, in implementing the Transgender Service Member Ban, to determine by February 21, 2018 how to "address" currently serving transgender men and women. Although these service members were permitted to continue serving until this determination was made, transgender service members were immediately impacted by the Transgender Service Member Ban.

213. All service members who are transgender immediately have grave reason to fear for their careers, and must reevaluate career plans that were premised on the Open Service Directive. Serving Plaintiffs and other service members who are transgender experience significant stress and psychological harm caused by this impending threat to their military service.

214. Service members who are transgender were and are also immediately injured by the stigma created by the Transgender Service Member Ban. Even if some transgender service members are permitted to continue serving under the Implementation Plan, they now serve in a military where the Commander-in-Chief has announced that their service is unwanted and unwelcome, they are potentially subject to discharge at any time solely on the basis of their transgender status or characteristics associated with the status, their medically necessary care could be withheld, and they may be held to entirely different standards on issues such as deployability and career development that differ from standards applied to other service members. Any transgender service member permitted to remain in the military will necessarily be treated as, and experience the harms associated with, a form of second-class status.

215. The Implementation Plan has not cured this harm. The Implementation Plan attempts to circumvent scrutiny on this issue by including a grandfather clause that purportedly exempts current openly serving transgender service members from immediate discharge. However, the scope of protection under the grandfather exemption is unclear, and the Implementation Plan specifically states that this clause may be severed in certain circumstances. Additionally, the Implementation Plan states that transgender service members serving under the grandfather exemption must "not be deemed to be non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12

months)." The Implementation Report states that hormone treatments for transgender service members "could render [them] non-deployable for a significant period of time—*perhaps even a year*" (emphasis added), despite the fact that the military does not consider hormones used to treat other conditions as disqualifying from deployment. This suggests that Defendants intend to develop standards or interpretations that would differentially impact transgender service members, creating a backdoor to the grandfather clause that Defendants may open at any time.

216. Furthermore, the inclusion of a grandfather exemption does not address the injury from stigma. Transgender service members will still be treated as a suspect group, subject to a set of standards different from those governing other service members. The Implementation Report contains unsubstantiated allegations that can be used to blame transgender service members for poor unit performance, by claiming that the mere presence of a transgender service member may harm unit cohesion and military readiness. Transgender service members will be marked as unwanted by their Commander-in-Chief, and their presence in the military may be attributed to "judicial interference" rather than their qualifications, hard work, personal sacrifice, and patriotism.

ii. Ban on New Enlistments and Commissions (Directive Section 2(a) of the Ban)

217. Section 2(a) of the Transgender Service Member Ban directed the Secretary of Defense to "maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018."

218. In so stating, Section 2(a) prohibited men and women who are transgender from enlisting and serving openly in the United States Armed Forces. The Open Service Directive had determined that men and women who are transgender would not be disqualified, subject to rigorous accession criteria, at the end of a phase-in period on July 1, 2017. Defendant Mattis

delayed new enlistments for a further six months on the asserted basis that further study was warranted.

219. DoD treats commissioning as an officer as a new accession. Thus, candidates who would otherwise be eligible for commissions, would not be eligible as a result of President Trump's indefinite ban on new accessions.

220. The Department of Defense has implemented the ban by disqualifying transgender individuals from open service. The Implementation Plan categorically bans "[t]ransgender persons who require or have undergone gender transition," and disqualifies all "[t]ransgender persons with a history or diagnosis of gender dysphoria" from military service. The only people who are actually able to serve under the Implementation Plan are people who are not transgender at all.

iii. Ban on Medically Necessary Care (Directive Section 2(b) of the Ban)

221. Section 2(b) of the Transgender Service Member Ban directed the Secretary of Defense to "halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel," except "to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex."

222. Transgender service members who require medically necessary care to treat gender dysphoria are entitled to care on an equal basis to what is provided to non-transgender service members with medical conditions requiring comparable medically necessary care.

223. Many of the same or substantially equivalent surgical procedures banned by the Transgender Service Member Ban are covered by the military when used to treat other medical conditions. The Transgender Service Member Ban singled out transgender service members for

different treatment by denying them coverage for medically necessary care that is inherently related to their transgender status and gender nonconformity.

224. The Implementation Plan fails to cure this immediate harm. While the Implementation Plan claims that transgender service members who meet certain limited criteria relating to the date their gender dysphoria was diagnosed "may continue to receive all medically necessary care," the Implementation Plan provides no details as to what will be considered "medically necessary" or the process that will govern requests for and provision of such care. In light of the Implementation Report's distortion of medical literature regarding the efficacy of care for gender dysphoria and rejection of the views of the mainstream medical community, it is unclear what care will still be provided.

225. Under the Implementation Plan, transgender service members will be held to different standards to receive medically necessary care than all other members of the U.S. military, even where a transgender service member seeks the very same or substantially equivalent medical procedures.

* * *

226. The Defendants' actions of adopting, implementing, and enforcing each of the policies in the Transgender Service Member Ban, whether through the Implementation Plan or via other means, discriminate against Serving Plaintiffs and Enlisting Plaintiffs and other men and women who are transgender on the basis of sex, which is subject to, and fails, heightened scrutiny under the Fifth Amendment.

227. The Defendants' actions of adopting, implementing, and enforcing each of the policies in the Transgender Service Member Ban, whether through the Implementation Plan or via other means, discriminate against the Serving Plaintiffs and Enlisting Plaintiffs and other

men and women who are transgender on the basis of their transgender status, which is independently subject to, and fails, heightened scrutiny under the Fifth Amendment.

a. Men and women who are transgender, as a class, have historically been subject to discrimination.

b. Men and women who are transgender, as a class, have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society.

c. Men and women who are transgender, as a class, exhibit immutable or distinguishing characteristics that define them as a discrete group.

d. Men and women who are transgender, as a class, are a minority with relatively little political power.

228. The Defendants' actions of adopting, implementing, and enforcing each of the policies in the Transgender Service Member Ban, whether through the Implementation Plan or via other means, discriminate against Serving and Enlisting Plaintiffs and other transgender individuals on the basis of invidious stereotypes, irrational fears, and moral disapproval, which are not permissible bases for differential treatment under any standard of review.

229. As a result of the policies, practices, and conduct of the Defendants, men and women who are transgender, including Serving Plaintiffs and Enlisting Plaintiffs and members of Plaintiff ACLU of Maryland, have suffered, or imminently will suffer, harm, including stigma, humiliation and/or emotional distress, loss of liberty, loss of salary and benefits on which they and their dependents rely, loss of access to medically necessary care, threatened disruption of their military service (including loss of promotion and other career opportunities), and violations of their constitutional right to equal protection. Defendants' conduct continues to

violate the equal protection rights of men and women who are transgender on a daily basis and is the proximate cause of widespread harm among Plaintiffs.

230. Plaintiffs seek declaratory and injunctive relief because they have no adequate remedy at law to prevent future injury caused by Defendants' violation of their Fifth Amendment rights to equal protection.

COUNT II (Against All Defendants)

VIOLATION OF SUBSTANTIVE DUE PROCESS

231. Plaintiffs re-allege and incorporate by reference as if fully set forth herein the allegations in all preceding paragraphs.

232. The substantive component of the Fifth Amendment's Due Process Clause includes not only the privileges and rights expressly enumerated by the Bill of Rights, but also includes the fundamental rights implicit in the concept of ordered liberty.

233. The Fifth Amendment bars certain government actions regardless of the fairness of the procedures used to implement them, particularly conduct that is so arbitrary as to constitute an abuse of governmental authority.

234. As a result of the Transgender Service Member Ban and the Implementation Plan, men and women who are transgender, including Serving Plaintiffs and Enlisting Plaintiffs, have suffered, or will imminently suffer, a violation of their right to substantive due process because, due to their transgender status, and without any reasoned basis, they are denied an opportunity to demonstrate their continued fitness for duty; the ability to enlist in the U.S. Armed Forces despite being fit to serve; and/or the opportunity to receive medical care on an equal basis as service members and enlistees who are not transgender. Moreover, the Transgender Service Member Ban and the Implementation Plan unfairly and indefensibly strip the Serving Plaintiffs

and other transgender service members of opportunities and benefits previously recognized by DoD's Open Service Directive, on which they relied.

235. President Trump issued the Transgender Service Member Ban, directing that: (i) transgender status is a basis for discharge, and current service members who are transgender are barred from serving in the U.S. Armed Forces, irrespective of their ability to demonstrate their fitness to serve (§ 1(b)); (ii) enlistment in the military or commissioning as an officer by men and women who are transgender is prohibited, irrespective of their ability to demonstrate their fitness to serve (§ 2(a)); and (iii) currently serving transgender service members are denied medically necessary surgical care, including in cases where individuals are stable in their gender transition and able to demonstrate their fitness to serve on the same basis as other service members (§ 2(b)).

236. The Department of Defense's Implementation Plan enforces and implements the Transgender Service Member Ban by (i) subjecting transgender service members to discharge, (ii) prohibiting transgender recruits from enlisting or commissioning, and (iii) denying medically necessary treatments to transgender service members. The Implementation Plan's "grandfather" clause fails to offer meaningful protection from these harms: the clause is limited to exempting a subsection of transgender service members and enlistees, is not clearly defined, and may be rescinded at any time.

237. Each of these policies—as well as the Transgender Service Member Ban and the Implementation Plan as a whole— is arbitrary and inconsistent with available data, serves no legitimate government interest, and therefore violates Plaintiffs' rights to substantive due process.

238. The Defendants directly and proximately caused, and continue to cause, the violation of Plaintiffs' rights to substantive due process under the law.

239. As a result of the policies, practices, and conduct of the Defendants, men and women who are transgender, including Serving Plaintiffs and Enlisting Plaintiffs and members of Plaintiff ACLU of Maryland, have suffered, or imminently will suffer, harm, including stigma, humiliation and/or emotional distress, loss of liberty, loss of salary and benefits on which they and their dependents rely, loss of access to medically necessary care, disruption of their military service (including loss of promotion and other career opportunities), and violations of their constitutional right to substantive due process. Defendants' conduct continues to violate the substantive due process rights of men and women who are transgender on a daily basis and is the proximate cause of widespread harm among Plaintiffs.

240. Plaintiffs seek declaratory and injunctive relief because they have no adequate remedy at law to prevent future injury caused by Defendants' violation of their Fifth Amendment rights to substantive due process.

RELIEF REQUESTED

Wherefore, Plaintiffs respectfully request that this Court:

A. Issue a declaratory judgment that the policies and directives encompassed in President Trump's Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017 and entitled "Military Service by Transgender Individuals" and in Secretary Mattis's February 22, 2018, memorandum regarding "Military Service by Transgender Individuals" violate the equal protection component of the Fifth Amendment to the U.S. Constitution, and are invalid on their face and as applied to Plaintiffs;

B. Issue a declaratory judgment that the policies and directives encompassed in President Trump's Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017 and entitled "Military Service by Transgender Individuals," and in Secretary Mattis's February 22, 2018, memorandum regarding "Military Service by Transgender Individuals," violate the Fifth Amendment's guarantee of substantive due process, and are invalid on their face and as applied to Plaintiffs;

C. Issue an Order permanently enjoining Defendants Mattis, Esper, Spencer, Wilson, Nielsen, and Zukunft from implementing and enforcing the policies and directives encompassed in President Trump's Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017 and entitled "Military Service by Transgender Individuals," and in Secretary Mattis's February 22, 2018, memorandum regarding "Military Service by Transgender Individuals."

D. Award reasonable attorneys' fees and allowable costs of court; and

E. Award such other and further relief as it may deem appropriate and in the interests of justice.

Dated: April 23, 2018

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al. *

Plaintiffs *

vs. * CIVIL ACTION NO. MJG-17-2459

DONALD J. TRUMP et al. *

Defendants *

* * * * * * * * *

MEMORANDUM & ORDER RE: CLARIFICATION

The Court has before it Defendants' Motion for Clarification and, if Necessary, a Partial Stay of Preliminary Injunction Pending Appeal [ECF No. 91] and the materials related thereto. The Court finds a hearing unnecessary.

I. CLARIFICATION

Defendants seek clarification from the Court that the Preliminary Injunction [ECF No. 84], issued on November 21, 2017, does not prohibit the Secretary of Defense from exercising his independent discretion to defer the January 1, 2018 effective date for the accessions provision of the Open Service Directive.[1] The Court's Order did not address nor contemplate

[1] The Open Service Directive was issued by then-Secretary of Defense Carter on June 30, 2016, and the accessions provision was scheduled to go into effect on July 1, 2017. On June 30, 2017, Secretary of Defense Mattis delayed the effective date to January 1, 2018.

addressing any legitimate independent reasons for delaying the accessions provision. Defendants have not shown the impossibility of implementing the accessions provision within the planned timeframe. Nor have defendants shown a likelihood that the Secretary of Defense intends to take an action that would present the alleged issue.

By this motion, Defendants essentially ask this Court to issue an advisory opinion as to whether a hypothetical action that could be taken by Secretary Mattis could achieve the denial of accession to transgender applicants without violation of the outstanding Order. Determination of the legality of an action that would effectively delay the application of the Court Order would likely require resolution of a myriad of factual disputes. The motion seems to request judicial advice as to what can be done to delay transgender accession to the military that will not risk a contempt finding. The role of the federal courts is "neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000). Thus, the Court shall DENY Defendants' motion.

II. PARTIAL STAY

In the alternative, Defendants seek a partial stay of the Preliminary Injunction pending appeal.[2] Subsequent to filing the instant motion, Defendants also filed in the Fourth Circuit appellate case (No. 17-2398) an emergency motion for administrative stay and partial stay pending appeal. On December 21, 2017, the Fourth Circuit denied the motion. See Order, ECF No. 99. To the extent that the instant motion is not moot, the Court finds that Defendants have not met their burden to establish irreparable harm if they must implement the accessions provision by January 1, 2018. Nor have Defendants shown that the Court abused its discretion in weighing the equities to decide that a preliminary injunction was warranted such that they are likely to succeed on the merits of their appeal of the Preliminary Injunction. Granting a stay may harm Plaintiffs and is not in the public interest.

Accordingly, upon considering the four factors, Nken v. Holder, 556 U.S. 418, 434 (2009), the Court finds that they do not weigh in favor of a stay of the accession provision of the Court's preliminary injunction while the Fourth Circuit decides Defendants' appeal.

[2] The Court notes that in the corresponding D.C. Court case, Doe 1 v. Trump, No. 17-cv-0159-CKK, Defendants sought a partial stay pending appeal, and it was denied on December 11, 2017, the day before the instant motion was filed.

Defendants' Motion for Clarification and, if Necessary, a Partial Stay of Preliminary Injunction Pending Appeal [ECF No. 91] is DENIED.

SO ORDERED, on Thursday, December 28, 2017.

/s/
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al.	*	
Plaintiffs	*	
vs.	*	CIVIL ACTION NO. MJG-17-2459
DONALD J. TRUMP et al.	*	
Defendants	*	

* * * * * * * * *

MEMORANDUM AND ORDER RE: MOTIONS

The Court has before it Plaintiffs' Motion for Preliminary Injunction [ECF No. 40], Defendants' Motion to Dismiss [ECF No. 52], and the materials submitted relating thereto. The Court has reviewed the exhibits, considered the declarations submitted by the parties, held a hearing, and has had the benefit of the arguments of counsel. Any findings of facts stated herein are based upon the Court's evaluation of the evidence and the inferences that the Court has found it reasonable to draw from the evidence.

I. INTRODUCTION

In June 2015, then-Secretary of Defense Ashton Carter issued a statement characterizing the regulations that were in effect at that time relating to transgender[1] individuals serving

[1] Men and women who are transgender have a gender different

in the military as "an outdated, confusing, inconsistent approach that's contrary to our value of service and individual merit causing uncertainty that distracts commanders from our core missions." Statement by Secretary of Defense Ash Carter on DoD[2] Transgender Policy (July 13, 2015), Pls.' Mot. Ex. 28, ECF No. 40-31. Secretary Carter created a working group to study "the policy and readiness implications of welcoming transgender persons to serve openly." Id. The working group included representatives of the leadership of the Armed Forces; the Joint Chiefs of Staff; the service secretaries; and personnel, training, readiness, and medical specialists from across the Department. See id.; Carson ¶¶ 1, 8–10, ECF No. 40-37.[3] The working group performed a systematic review including commissioning studies[4] and meetings with transgender service members, outside experts, medical personnel, military leaders, allied militaries, and others. Carson ¶¶ 1, 8–27. After the year-long study, the working group ultimately concluded that "[o]pen service by transgender service members would not impose

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from the one assigned to them at birth. See, e.g., Brown Decl. ¶¶ 20-23, ECF No. 40-32; Pls.' Mot. Ex. C ("the RAND Report") 5-6, 75, ECF No. 40-35.

[2] Department of Defense.

[3] The Hon. Brad R. Carson served as the Acting Under Secretary of Defense for Personnel and Readiness from April 2, 2015 to April 8, 2016. Carson ¶ 1, ECF No. 40-37.

[4] Including a study conducted by the RAND Corporation—a nonpartisan, nonprofit military think tank founded by the U.S. Air Force. Rand Report, ECF No. 40-35.

any significant burdens on readiness, deployability, or unit cohesion." Wilmoth ¶ 23, ECF No. 40-38.

On June 30, 2016, then-Secretary of Defense Carter issued a directive rescinding the policy of discriminating against men and women who are transgender. Open Serv. Dir., Pls.' Mot. Ex. 1, ECF No. 40-4. The Open Service Directive provided that "no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity." Id. at Attach. § 1(a). Men and women who are transgender are "subject to the same standards as any other Service member of the same gender." Id. at Attach. § 1(b). The Directive further provided that medical conditions affecting transgender service members would be treated "in a manner consistent with a Service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition." Id. at Attach. § 1(c). These medical services included medical treatment necessary to transition gender while serving. Id. at Attach. § 3(a). The Directive also announced that individuals wishing to join the military would not be prohibited from doing so solely because they are transgender, although there were additional stringent medical requirements to ensure fitness for

duty. Id. at Attach. § 2. The implementation of the accession[5] policy was scheduled to begin "[n]ot later than July 1, 2017."[6] Id. at Attach. § 2(a).

On June 30, 2017, the day before new enlistments of transgender persons were scheduled to begin, current Secretary of Defense Jim Mattis announced that it was necessary to defer new transgender enlistments for an additional six months to January 1, 2018, while he reviewed the policy. Mattis Mem., Pls.' Mot. Ex. 8, ECF No. 40-11. He added that his announcement did not otherwise change the Open Service Directive and that "we will continue to treat all Service members with dignity and respect." Id.

Shortly thereafter, on July 26, 2017, President Trump precipitated a change to the policy in force by announcing on Twitter[7] that "the United States will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." Pls.' Mot. Ex. 19, ECF No. 40-22. President Trump

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[5] Accession refers to the process of bringing new enlisted recruits and officer candidates into the military.

[6] The deadline allowed the DoD a year to prepare for implementation. Given that the pre-established date for the Presidential election was November 8, 2016, it was understood that the deadline extended into a new Administration.

[7] President Trump later claimed that his Twitter announcement did the military a "great favor" by ending the "confusing issue" of transgender service. Cooper, Trump Says Transgender Ban Is a 'Great Favor' for the Military, N.Y. Times (Aug. 10, 2017), Pls'. Mot. Ex. 9, ECF No. 40-12.

formalized the transgender service member ban on August 25, 2017, in a Memorandum ("the President's Memorandum") stating that in his judgment, the DoD had "failed to identify a sufficient basis to conclude" that the Open Service Directive "would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." President's Mem. § 1(a), Pls.' Mot. Ex. 18, ECF No. 40-21. The memorandum addressed, and rescinded, each component of the Open Service Directive. Id. at §§ 1(b), 2.

The instant lawsuit was filed on August 8, 2017, and three others[8] have been filed in response to the President's policy change. Plaintiffs here seek declaratory and injunctive relief (including a Motion for Preliminary Injunction). Defendants seek dismissal of the Amended Complaint [ECF No. 39] pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and denial of Plaintiffs' Motion for Preliminary Injunction.

For reasons as stated herein, the Court GRANTS Plaintiffs' Motion for Preliminary Injunction [ECF No. 40], and GRANTS IN

[8] Doe 1 v. Trump, No. 17-cv-0159-CKK, filed Aug. 9, 2017 in the United States District Court for the District of Columbia; Karnoski v. Trump, No. 17-cv-01297-MJP, filed Aug. 28, 2017 in the United States District Court for the Western District of Washington at Seattle; Stockman v. Trump, No. 17-cv-1799-JGB-KK, filed on Sept. 5, 2017 in the United States District Court for the Central District of California.

PART and DENIES IN PART Defendants' Motion to Dismiss [ECF No. 52].

II. BACKGROUND

A. Transgender Military Policy Prior to June 2016

"On September 20, 2011, the military policy known as 'Don't Ask, Don't Tell' (DADT) ended, allowing gay, lesbian and bisexual service members to serve openly." Gates & Herman, Transgender Military Service in the United States (May 2014), ECF No. 40-7. However, until June 2016, military policies continued to exclude transgender people from serving openly. Id. Transgender individuals wanting to join the military were prohibited from doing so, and transgender individuals already serving were subject to discharge if their condition became known. Id. See also Brown Decl. 9-14, ECF No. 40-32 (noting that pre-2016 military policy listed "Sexual Gender and Identity Disorders" among conditions that rendered a service member unfit and subject to discharge).

B. Transgender Open Service Directive

On June 30, 2016, after a year-long study, then-Secretary of Defense Carter issued a Directive–type Memorandum ("DTM") mandating the establishment of policy and procedures for "the

retention, accession, separation, in-service transition, and medical coverage for transgender personnel serving in the Military Services." Open Serv. Dir., Pls.' Mot. Ex. 1, ECF No. 40-4. The DTM stated:

> The policy of the Department of Defense is that service in the United States military should be open to all who can meet the rigorous standards for military service and readiness. Consistent with the policies and procedures set forth in this memorandum, transgender individuals shall be allowed to serve in the military.

Id. at 2.

The DTM procedures included three main components.

First, retention. Effective June 30, 2016, "no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity." Id. at Attach. § 1(a). Transgender service members became subject to the same standards as any other service member of the same gender. Id. at Attach. § 1(b).

Second, accession. Not later than July 1, 2017, the DoD Instruction 6130.03 was to be updated to reflect changed policies and procedures related to medical standards for entry into the military. Id. at Attach. § 2(a). A history of gender

dysphoria[9] continued to be disqualifying unless the applicant was medically-certified as having been "stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months." Id. Also, a history of medical treatment with gender transition continued to be disqualifying unless the applicant had completed medical treatment and had been stable in the preferred gender for 18 months, and if the applicant was receiving hormone treatment, the individual had been stable on such treatment for 18 months. Id. Further, a history of sex-reassignment surgery continued to be disqualifying unless a period of 18 months had passed since the most recent surgery, no additional surgeries were required, and the applicant had no functional limitations or complications persisting from the surgery. Id. The Secretaries of the Military Departments and Commandant of the United States Coast Guard could waive the 18-month period in individual cases. Id. at Attach. § 2(b).

Third, sex reassignment surgery. Effective October 1, 2016, the DTM procedures allowed for in-service gender transition and

[9] Transgender status alone does not constitute a medical condition; some transgender individuals experience significant distress due to the gender-sex mismatch and are considered to have a medical condition called gender dysphoria. RAND Report 5-6, 75, ECF No. 40-35. This condition can be medically treated with some combination of psychosocial, pharmacological (mainly hormonal), or surgical care. Id. at 6.

provided for further guidance on the provision of necessary medical care and treatment to transgender service members. Id. at Attach. §§ 3, 4.

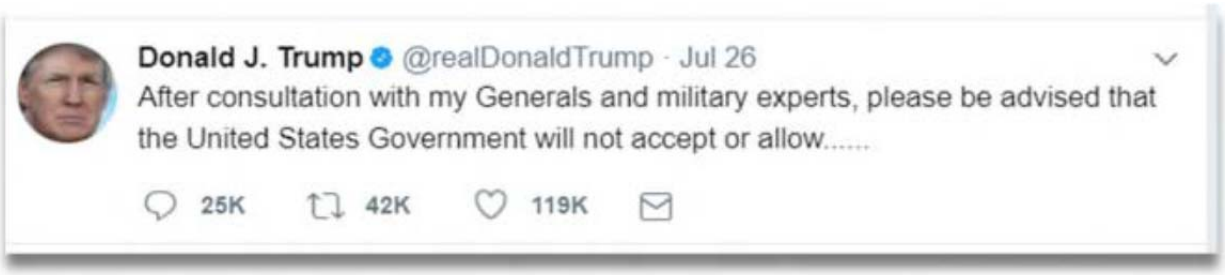
In addition, the DTM included an equal opportunity statement and clarified the DoD's position, "consistent with the U.S. Attorney General's opinion, that discrimination based on gender identity is a form of sex discrimination." Id. at Attach. § 5(a). Education and training materials were to be developed and disseminated to each Military Department by no later than October 1, 2016, and each Military Department was directed to issue implementing guidance and a written training and education plan by November 1, 2016. Id. at Attach. §§ 6, 7.

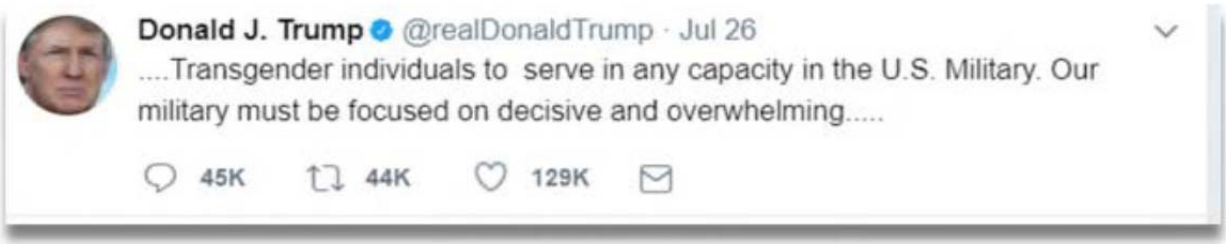
Consistent with the DTM directives, the DoD issued an Implementation Handbook on September 30, 2016. DoD, Transgender Service in the U.S. Military: An Implementation Handbook, ECF No. 40-9.

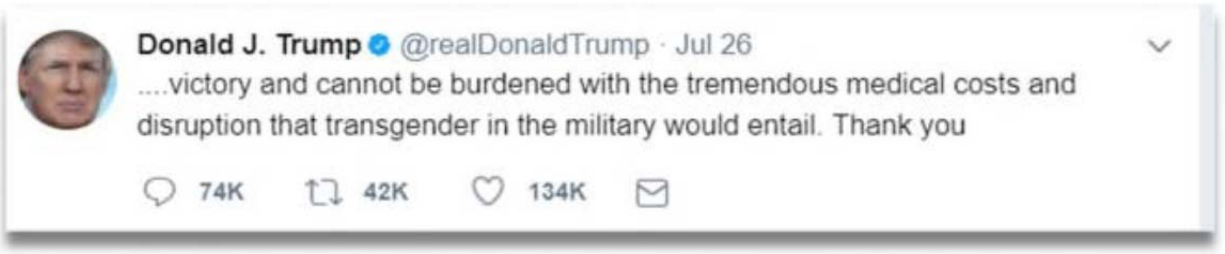
C. President's Memorandum and Interim Guidance

On June 30, 2017, Secretary of Defense James Mattis deferred implementation of the DTM's directive regarding accession until January 1, 2018. Mattis Mem., Pls.' Mot. Ex. 8, ECF No. 40-11.

On July 26, 2017, President Trump published three tweets under the handle @realDonaldTrump:







Pls.' Mot. Ex. 19, ECF No. 40-22.

Approximately a month later, on August 25, 2017, President Trump issued a memorandum entitled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security." President's Mem., Pls.' Mot. Ex. 18, ECF No. 40-21. In the first section, President Trump stated:

> Until June 2016, the Department of Defense (DoD) and the Department of Homeland Security (DHS) (collectively, the Departments) generally prohibited openly transgender individuals from accession into

> the United States military and authorized the discharge of such individuals.

Id. at § 1.

President Trump directed the Departments' Secretaries "to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 . . . ." Id. at § 1(b) ("the Retention Directive"). He further directed the Secretaries to "maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018 . . . ." Id. at § 2(a) ("the Accession Directive"). President Trump also directed the Secretaries to "halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex." Id. at § 2(b) ("the Sex Reassignment Surgery Directive").

The Accession Directive is to take effect on January 1, 2018; the Retention Directive and the Sex Reassignment Surgery Directive are to take effect on March 23, 2018. Id. at § 3.

President Trump further directed:

> By February 21, 2018, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall submit to me a plan for implementing both the general policy set forth in section 1(b) of this

> memorandum and the specific directives set forth in section 2 of this memorandum.

Id. He added that "no action may be taken" under the Retention Directive against transgender individuals currently serving in the United States military until the Secretary of Defense has determined how to address such individuals. Id.

On September 14, 2017, Secretary of Defense James Mattis issued a memorandum establishing an interim policy until the directives take effect. Defs.' Mem., ECF No. 45, Ex. 1 ("Interim Guidance"). Under the Interim Guidance policy, there is no immediate effect on individual service members pending the implementation plan. Id. The Interim Guidance states that "[n]ot later than February 21, 2018, [Secretary Mattis] will present the President with a plan to implement the policy and directives in the Presidential Memorandum." Id. at 1.

D. The Instant Lawsuit

The individual plaintiffs[10] and the American Civil Liberties Union of Maryland, Inc. ("ACLU") (collectively, "the Plaintiffs") have sued Donald J. Trump in his official capacity as the President of the United States, James Mattis in his official capacity as Secretary of Defense, Ryan McCarthy in his official capacity as Acting Secretary of the U.S. Department of

[10] Described individually herein in Section II.E.

the Army, Richard Spencer in his official capacity as Secretary of the U.S. Department of the Navy, and Heather Wilson in her official capacity as Secretary of the U.S. Department of the Air Force (collectively, "the Defendants") for declaratory and injunctive relief. Am. Compl., ECF No. 39.

Plaintiffs seek a declaratory judgment that the policies and directives encompassed in President Trump's Memorandum dated August 25, 2017, violate the Fifth Amendment's guarantee of equal protection and substantive due process and are invalid on their face and as applied to Plaintiffs. The Amended Complaint asserts three causes of action:

- Count I – Violation of the Equal Protection Component of the Fifth Amendment's Due Process Clause
- Count II – Violation of Substantive Due Process
- Count III – Violation of 10 U.S.C. § 1074.

Plaintiffs' Motion for Preliminary Injunction [ECF No. 40] seeks to bar Defendants from enforcing the policies and directives encompassed in President Trump's August 25, 2017, Memorandum until such time as the Court renders a final judgment on the merits of this action.

On October 12, 2017, Defendants filed a Motion to Dismiss [ECF No. 52], seeking dismissal pursuant to Rules[11] 12(b)(1) and

[11] All "Rule" references cited herein are to the Federal Rules

12(b)(6) and denial of any Preliminary Injunction. Defendants assert that this Court does not have jurisdiction over this action because Plaintiffs have not suffered an injury sufficient to establish standing and because the issues presented are not ripe for review. Defendants contend that "Plaintiffs have not stated plausible claims that the President's decision to maintain the status quo while Secretary Mattis studies military service by transgender individuals violates equal protection, due process, or Federal statutes." Reply 14, ECF No. 77.

In addition to the parties' briefs and arguments, the Court has received and considered the following briefs from Amicus Curiae in support of Plaintiffs' Motion for Preliminary Injunction:

- The Trevor Project[12] [ECF No. 62],
- Retired Military Officers and Former National Security Officials [ECF No. 71], and
- Amici States Massachusetts, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and the District of Columbia [ECF No. 73].

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of Civil Procedure.

[12] Described as "the nation's largest lesbian, gay, bisexual, transgender, queer, and questioning ("LGBTQ") youth crisis intervention and suicide prevention organization." Trevor Project Amicus Brief 1, ECF No. 62.

E. The Individual Plaintiffs[13]

1. Petty Officer First Class Brock Stone

Brock Stone ("Stone") is 34 years old and has served 11 years in the United States Navy, including a 9-month deployment to Afghanistan. Stone is currently assigned, until August 2020, to a unit at Fort Meade in Maryland, where he works as a computer analyst. Stone was awarded an achievement medal in connection with his deployment, and he has received multiple other commendations, including the Joint Commendation Medal, the Navy Commendation Medal, the Afghan Campaign Medal, a flag letter of commendation, and multiple recommendations for early promotion. He is currently eligible for promotion to Chief Petty Officer. Stone's goal is to serve for at least 20 years and qualify for retirement benefits. His current contract runs until 2023, which would end three years short of his achieving enough years in service to meet his retirement goal.

Stone has been undergoing hormone therapy as a medically-necessary part of his gender transition. Since arriving at Fort Meade in July 2017, he has received medically-necessary treatment related to his gender transition at Walter Reed National Military Medical Center in Bethesda, Maryland. Prior to

[13] Plaintiffs' genders are referred to herein by the gender as recognized by the Defense Enrollment Eligibility Report System ("DEERS"), except in one case as noted where the formal changed gender remains pending.

his transfer to Fort Meade, Stone was close to finalizing a medical treatment plan that included surgery. After the transfer in July 2017, he had to restart the treatment plan, but it is now in the final approval stage. The treatment plan will be sent to the medical review board at Walter Reed in November 2017 and thereafter will be submitted to Navy Medical East for final medical approval. Plaintiffs assert that it is "highly likely that Petty Officer Stone will not receive one or both of his medically-necessary surgeries before March 23[, 2018]." Opp. Dismiss 11, ECF No. 66.

2. Staff Sergeant Kate Cole

Kate Cole ("Cole") is 27 years old and has served in the United States Army for almost ten years, including a one-year deployment to Afghanistan where she served as a team leader and designated marksman. Cole is currently stationed at Fort Polk, Louisiana, working as a Cavalry Scout, where she operates with a tank unit. Since enlisting at age 17, Cole has received seven achievement medals and two Army commendation medals. She recently received orders to enroll in Drill Sergeant School starting on January 3, 2018, with an anticipated graduation date of March 7, 2018. Following her return from Drill Sergeant

School, she is scheduled to change station from Fort Polk, Louisiana to Fort Benning, Georgia.

Cole has been undergoing hormone therapy and was scheduled to receive medically-necessary surgery related to her gender transition in or around September 2017. On September 8, 2017, she was informed that her surgical treatment was denied and her pre-surgical consultation was cancelled. Cancellation has been remedied, but "Cole's treatment plan calls for two additional surgeries, neither of which she will be able to undergo before March 23[, 2018], and one of which she is not even eligible for until after that date." Opp. Dismiss 11, ECF No. 66.

3. Senior Airman John Doe

John Doe ("Doe") is 25 years old and has served for approximately six years on active duty in the United States Air Force, during which he was awarded "airman of the year." Doe also served in Qatar for a six-month deployment. Doe is currently stationed at Little Rock Air Force Base, Arkansas and serves as the suicide prevention and interpersonal violence instructor for the base and is pursuing cryogenics certification. Doe reenlisted on September 9, 2017.

In 2014, Doe began his gender transition, including undergoing certain surgeries, for which he paid out-of-pocket.

He has been undergoing hormone therapy as a medically-necessary part of his gender transition and planned to receive an additional medically-necessary surgery in August 2017. Doe was informed by email from the medical command at the base where he was scheduled to undergo the surgery that all gender-transition-related surgeries were on hold. Defendants assure that, pursuant to the Interim Guidance, the surgery was not deleted from Doe's treatment plan and can be rescheduled at his request.

4. Airman First Class Seven Ero George

Seven Ero George ("George") is 41 years old and has been enlisted in the Air National Guard since 2015. George is currently stationed at the Selfridge Air National Guard Base, Michigan and serves in the base security force, where he is a member of the base Honor Guard. He performs military funeral honors for deceased veterans, retirees, and active duty members; provides dignified transfers, and performs color guard details. George has a Bachelor's Degree in General Studies from the University of Michigan and is currently taking additional training as a nurse. He is scheduled to complete his Associate's Degree in nursing in December 2017 and plans to pursue a program to earn his Bachelor's Degree in nursing, which he expects to be able to complete in 12-18 months.

George intends to seek a commission, which subjects him to the Army's accession policies. He has been unable to pursue a commission to date because the historical ban has not yet expired and because his gender has not yet been updated in the Defense Enrollment Eligibility Report System ("DEERS"), which still lists him as female. George believes all required paperwork has been submitted to update his DEERS gender, his letters of recommendation are lined up, and he expects to be ready to commission immediately upon the lift of the ban in January 2018.

As a medically-necessary part of his gender transition, George has been undergoing hormone therapy and has undergone a medically-necessary surgery, but no further surgeries are required under his medical treatment plan.

5. Petty Officer First Class Teagan Gilbert

Teagan Gilbert ("Gilbert") is 31 years old and has served in the United States Navy for 13 years, including a one-year deployment to Afghanistan. Gilbert is currently serving as an information and space systems technician in the Naval Reserve stationed in Phoenix, Arizona. She has been pursuing an undergraduate degree as a prerequisite to commission as an officer and is scheduled to complete her Bachelor's Degree in

Earth and Space Exploration in the Spring of 2019, as well as an undergraduate certificate in Geographic Information Systems. Gilbert's current term of service expires in February 2018, and she is in the process of reenlisting in the Navy for another six-year term.

Gilbert has been undergoing hormone therapy as a medically-necessary part of her gender transition. She has a medical appointment scheduled for January 2018 to update her treatment plan to include medically-indicated surgical treatment.

6. Technical Sergeant Tommie Parker

Tommie Parker ("Parker") is 54 years old and has served in the Marine Corps for four years and has served in the Air National Guard for 26 years. During her sixteen plus years of active duty, she has had deployments to Okinawa with the Marine Corps and Germany with the Air National Guard. She is currently stationed at Stewart Air National Guard Base, New York, working as a fuel technician.

Parker's current term of service expires in January 2018. Her commanding officer informed her that he would recommend her for active duty reenlistment for an additional term of three years thereafter. Parker is eligible for retirement in three-and-a-half years, and her goal is to serve until retirement.

Parker is undergoing hormone therapy as a medically-necessary part of her gender transition and is currently paying out-of-pocket while waiting for her transition plan to be fully approved. She does not intend to have any transition-related surgeries.

F. The D.C. Court Decision

On Monday, October 30, 2017, a memorandum and order was issued in a related case, Doe 1 v. Trump, in the United States District Court for the District of Columbia ("D.C. Court"). The D.C. Court preliminarily enjoined implementation of the Retention Directive and the Accession Directive but not the Sex Reassignment Surgery Directive. Doe 1 v. Trump, --- F. Supp. 3d ----, No. CV 17-1597 (CKK), 2017 WL 4873042 (D.D.C. Oct. 30, 2017).

In Doe 1, current and aspiring transgender service members challenged the Accession, Retention, and Sex Reassignment Surgery Directives on the grounds that the Directives violated plaintiffs' Fifth Amendment equal protection and due process rights. Id. at *1. The Doe 1 plaintiffs also argued that the defendants were estopped from rescinding the rights, benefits, and protections promised to the plaintiffs. Id. at *2.

The D.C. Court held that the Doe 1 plaintiffs had standing to challenge the Accession and Retention Directives but lacked standing to challenge the Sex Reassignment Surgery Directive. Id. The court found that the Presidential Memorandum unequivocally directed the military to prohibit indefinitely the accession of transgender individuals and to authorize their discharge and that there was no reason to believe that these directives would not be executed. Id. at *1. The court held that the plaintiffs had established that they would be injured by these directives, "due both to the inherent inequality they imposed, and the risk of discharge and denial of accession that they engender. Further delay would only serve to harm the Plaintiffs." Id.

The D.C. Court also found that the Doe 1 plaintiffs were likely to prevail on their Fifth Amendment challenge of the Accession and Retention Directives. Id. at *2. First, the court found that "[a]s a form of government action that classifies people based on their gender identity, and disfavors a class of historically persecuted and politically powerless individuals, the President's directives are subject to a fairly searching form of scrutiny." Id. at *2. The Directives could not survive such scrutiny because they were not "genuinely based on legitimate concerns regarding military effectiveness or

budget constraints, but [we]re instead driven by a desire to express disapproval of transgender people generally." Id.

More specifically, the court found that a number of factors —including the breadth of the exclusion, the unusual circumstances surrounding the President's announcement, the reasons given for the Directives not appearing to be supported by any facts, and the recent rejection of those reasons by the military itself—"strongly suggest that plaintiffs' Fifth Amendment claim is meritorious." Id. Finally, the court dismissed without prejudice Plaintiffs' estoppel claim, because the complaint "lack[ed] allegations of the sort of particularized representations, reliance, or government misconduct that could justify estoppel against the government." Id.

The D.C. Court granted in part and denied in part the Doe 1 plaintiffs' motion for a preliminary injunction, enjoining the enforcement of the Accession and Retention Directives and reverting the policy to the status quo that had existed before the Presidential Memorandum. Id. The court also granted in part and denied in part the defendants' motion to dismiss the lawsuit, thus dismissing plaintiffs' estoppel challenge and dismissing the plaintiffs' challenge of the Sex Reassignment Surgery Directive for lack of jurisdiction. Id. The D.C. Court

found that none of the plaintiffs in that case could demonstrate a non-speculative injury-in-fact with respect to the Sex Reassignment Surgery Directive. Id. at *51.

III. DISCUSSION

A. The Court's Jurisdiction

1. Legal Standard

a. Standing

The issue of plaintiff standing presents a threshold jurisdictional question because "Article III of the U.S. Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" Beck v. McDonald, 848 F.3d 262, 269 (4th Cir. 2017), cert. denied sub nom. Beck v. Shulkin, 137 S. Ct. 2307 (2017) (quoting U.S. Const. art. III, § 2). "The core goal of the standing inquiry is to ensure that a plaintiff bringing an action has enough of a stake in the case to litigate it properly." Pye v. United States, 269 F.3d 459, 466 (2001). The plaintiff bears the burden of proving jurisdiction by establishing the three "irreducible minimum requirements" of standing:

> (1) an injury-in-fact (i.e., a concrete and particularized invasion of a legally protected interest);
>
> (2) causation (i.e., a fairly traceable connection between the alleged injury

in fact and the alleged conduct of the defendant); and

(3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

Id. (quoting David v. Alphin, 704 F.3d 327, 333 (4th Cir. 2013)); Spokeo, Inc. v. Robins, ––– U.S. ––––, 136 S. Ct. 1540, 1547, as revised (May 24, 2016).

At the pleading stage, plausible factual allegations may suffice to demonstrate that each element of standing has been adequately pleaded. Spokeo, 136 St. Ct. at 1547; Beck, 848 F.3d at 270 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992)). However, the standing analysis is "especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013).

A defendant may challenge standing at the motion to dismiss stage either facially or factually. Wikimedia Found. v. Nat'l Sec. Agency, 857 F.3d 193, 208 (4th Cir. 2017)(quoting Beck, 848 F.3d at 270). "In a facial challenge, the defendant contends that the complaint 'fails to allege facts upon which [standing] can be based,' and the plaintiff 'is afforded the same procedural protection' that exists on a motion to dismiss." Id.

(quoting Adams, 697 F.2d at 1219). In a factual challenge, however, a trial court may look beyond the complaint to determine if there are facts to support the jurisdictional allegations. Id. "Unless the jurisdictional facts are intertwined with the facts central to the merits of the dispute, the district court may . . . resolve the jurisdictional facts in dispute by considering evidence outside the pleadings, such as affidavits." U.S. ex rel. Vuyyuru v. Jadhav, 555 F.3d 337, 348 (4th Cir. 2009) (citations omitted).

b. Ripeness

A second Article III threshold inquiry is whether the dispute is ripe for adjudication. Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC, 713 F.3d 187, 198 (4th Cir. 2013). The requirement that a case be ripe for decision is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." Reno v. Catholic Soc. Servs., 509 U.S. 43, 57 n. 18 (1993).

To determine if a case is ripe, the Fourth Circuit balances "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." Cooksey v. Futrell, 721 F.3d 226, 2226 (4th Cir. 2013) (quoting

Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003)); Lansdowne, 713 F.3d at 198.

"[A] case is 'fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties.'" Lansdowne, 713 F.3d at 198 (quoting Miller v. Brown, 462 F.3d 312, 319 (4th Cir. 2006)). "The hardship prong is measured by the immediacy of the threat and the burden imposed on the [plaintiff]." Id. at 199 (quoting Charter Fed. Sav. Bank v. Office of Thrift Supervision, 976 F.2d 203, 208–09 (4th Cir. 1992)).

2. Injury-in-fact

There is no dispute that the Plaintiffs have satisfied the causation and redressability elements of standing. While the matter is disputed, the Court finds that Plaintiffs have met their burden to satisfy the need for an injury-in-fact.

An injury-in-fact is the "[f]irst and foremost" of standing's three elements. Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 103 (1998). To suffer an injury-in-fact, the plaintiff must have suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Spokeo, 136 S. Ct. at 1548 (quoting Lujan, 504 U.S. at 560). The Spokeo

court stated that to constitute a concrete injury, an injury "must be 'de facto'; that is, it must actually exist . . . [that is] 'real,' and not 'abstract.'" Id.

"This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness." Id. at 1549. A court may find standing based on a threatened injury that is "certainly impending" or if there is a "substantial risk" that the harm will occur. Beck, 848 F.3d at 275 (quoting Clapper, 568 U.S. at 409, 414 n.5).

Defendants contend that the Interim Guidance maintains the status quo while the military studies the "President's policy directive," and therefore, they contend that none of the Plaintiffs face a current or imminent threat of injury. Defs.' Mot. 12, ECF No. 52-1. Defendants state that "it is unclear whether those currently serving members will be affected by the future policy regarding service by transgender individuals once it is finalized and implemented." Id. at 2.

When reviewing the effect of the directives in the President's Memorandum, the Court finds persuasive and agrees with the D.C. Court's analysis of the import of the President's Memorandum. See Doe 1, 2017 WL 4873042 at *16-18 ("there is a substantial likelihood that transgender individuals will be indefinitely prevented from acceding to the military as of

January 1, 2018, and that the military shall authorize the discharge of current service members who are transgender as of March 23, 2018."). As Plaintiffs allege, the result of the President's Memorandum, once implemented, constitutes a return to the policy in place prior to June 2016 "until President Trump is personally persuaded that a change is warranted." Am. Compl. ¶ 107. Although there is no immediate implementation pending the provision of the requested plan, the Interim Guidance states that "[n]ot later than February 21, 2018, [Secretary Mattis] will present the President with a plan to implement the policy and directives in the Presidential Memorandum." Interim Guidance 1, ECF No. 45, Ex. 1. "The Court must and shall assume that the directives of the Presidential Memorandum will be faithfully executed." Doe 1, 2017 WL 4873042, at *17. Therefore, the protections of the Interim Guidance expire on February 21, 2018.

The Court cannot interpret the plain text of the President's Memorandum as being a request for a study to determine whether or not the directives should be implemented. Rather, it orders the directives to be implemented by specified dates. President's Mem. § 3, Pls.' Mot. Ex. 18, ECF No. 40-21 ("shall take effect on January 1, 2018 [and] March 23, 2018").

a. Retention Directive Injury

The Retention Directive, which authorizes the discharge of service members from the military on the basis of transgender status alone, subjects all of the individual Plaintiffs[14] to the threat of discharge as administratively unfit even if they meet the military's demanding medical fitness standards. While it is possible, as Defendants contend, that none of the Plaintiffs will be discharged on March 23, 2018, they certainly face a substantial risk of being discharged solely on the basis of being transgender.

Importantly, Plaintiffs allege that becoming "subject to discharge" solely for being transgender is a loss of a right they have had since June 2016, withdrawing the guarantee that protects their ability to serve on terms equal to those applied to others. Am. Compl. Count I, ECF No. 39. The Retention Directive effectively constitutes a revocation of rights that transgender people had been given. This revocation of equal protection is an injury. See, e.g., Planned Parenthood Of S.C. Inc. v. Rose, 361 F.3d 786, 790 (4th Cir. 2004) ("Discriminatory treatment is a harm that is sufficiently particular to qualify as an actual injury for standing purposes.").

[14] Plaintiff Stone is a member of the ACLU of Maryland, which gives the ACLU associational standing on the basis of the injuries experienced by Stone. Am. Compl. ¶ 18; Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

Further, Plaintiffs allege that they are now suffering from the uncertainty, the destabilization of their lives and careers, and the stigma associated with being singled out as unfit for service. Am. Compl. ¶¶ 142-143. Stigmatic injury can be held sufficient to support standing. See Allen v. Wright, 468 U.S. 737, 755 (1984) (finding that "stigmatizing injury often caused by racial discrimination" is a type of "noneconomic injury" that is "sufficient in some circumstances to support standing"). In the instant case, the Court finds that Plaintiffs' stigmatization is an additional alleged harm that provides support to Plaintiffs' standing arguments, but the Court need not, and does not, address whether it would be sufficient on its own.

In sum, the Court finds that Plaintiffs have met their burden to demonstrate standing to challenge the Retention Directive.

b. Accession Directive Injury

The Accession Directive prohibits transgender individuals from entering or seeking a commission in the military solely on the basis of their transgender status. The current prohibition is set to expire on December 31, 2017, but the directive in the President's Memorandum extends the prohibition indefinitely.

Defendants contend that Plaintiffs have not been injured by the Accession Directive because no one has applied for accession into the military and been denied. Defendants assert that Plaintiffs George and Gilbert's plans to apply for a commission are too speculative and that they could apply for a waiver to allow their accession into the military under the Interim Guidance.

Plaintiffs George and Gilbert allege that they face imminent harm because they will be denied accession into the military as commissioned officers. Am. Compl. ¶¶ 40, 47, ECF No. 39; Decl. George, ECF No. 40-42; Suppl. Decl. George, ECF No. 66-9; Suppl. Decl. Gilbert, ECF No. 66-11. Plaintiff Gilbert has one year of coursework left in her degree before she plans to apply to Officer Candidate School and return to "active duty" status. However, Plaintiff George expects to be ready to commission immediately upon the lift of the ban in January 2018. Plaintiffs clarified at the hearing that George

> is ready, willing, and able to apply to directly commission as an officer as soon as he can. All he's been waiting for is for the final change in his gender market in the [DEERS] system to go through. He submitted all that paperwork. It should go through any minute. He wants to apply the first day that he can.
>
> . . . .

> [H]is ability to commission and his desire to commission are not contingent on him completing that nursing program.
>
> As soon as he can commission, he will. And he would do it on January 1st if he were allowed to do so.

Hr'g Tr. 48:4-17.

George has demonstrated that he is eligible to commission as an officer. He met with a recruiter in October 2016 to pursue an active duty commission. Suppl. Decl. George, ECF No. 66-9. George's plan and efforts to implement his plan are not speculative. The Court finds that Plaintiff George is subject to a substantial risk that his attempt to accede into the military as a commissioned officer will be prohibited solely on the basis of his transgender status.

Accordingly, the Court finds that Plaintiffs have met their burden to demonstrate standing to challenge the Accession Directive.

c. The Sex Reassignment Surgery Directive

The Sex Reassignment Surgery Directive prohibits the expenditure of military resources on sex-reassignment surgical procedures. President's Mem. § 2(b), ECF No. 40-21. This section takes effect on March 23, 2018. Id. § 3.

Defendants contend that no Plaintiff can demonstrate injury-in-fact because the military is continuing to provide transition-related medical care under the Interim Guidance. Any cancellations that occurred after the President's Memorandum have subsequently been remedied, so no one has been denied transition-related medical care. Defendants assert that the Plaintiffs in the instant case, like the plaintiffs in Doe 1, have not "'demonstrated that they are substantially likely to be impacted' by the relevant portion of the [President's] Memorandum." Defs.' Reply 8, ECF No. 77 (quoting 2017 WL 4873042, at *24).

In Doe 1, the D.C. Court held that the Doe 1 plaintiffs did not have standing to challenge the Sex Reassignment Surgery Directive because none of them had demonstrated an injury-in-fact with respect to that Directive. 2017 WL 4873042 at *51. First, the court noted that, for the two Doe 1 plaintiffs who were implicated by the provision, the risk of being impacted was not sufficiently great to confer standing. Id.

One of the Doe 1 plaintiffs alleged that her scheduled transition-related surgery had been canceled. However, the defendants submitted a declaration, which revealed that her application for supplemental health care waiver was currently being processed, and her transition related-surgery had been

rescheduled for January 4, 2018. Id. at *52. The defendants represented that this date remained unaffected by the Presidential Memorandum. Id. Therefore, the D.C. Court concluded that this plaintiff had failed to show that "she will not receive the surgery prior to the effective date of the Sex Reassignment Surgery Directive." Id.

A second Doe 1 plaintiff had developed a transition treatment plan but was not planning to begin her treatment until after a long-term deployment in Iraq. Id. The D.C. Court concluded that "[g]iven the possibility of discharge, the uncertainties attended by the fact that she has yet to begin any transition treatment, and the lack of certainty on when such treatment will begin, the prospective harm engendered by the Sex Reassignment Surgery Directive is too speculative . . . ." Id.

In the instant case, Plaintiffs Cole, Doe, Gilbert, and Stone are potentially impacted by the Sex Reassignment Surgery Directive. At the hearing, Plaintiffs asserted that they would rely on Plaintiffs Cole and Stone for standing to challenge the Sex Reassignment Surgery Directive. Hr'g Tr. 62:7-8.

Plaintiff Cole has a final, approved medical plan that calls for two additional surgeries. Suppl. Decl. Cole, ECF No. 66-8. Because Cole will be attending Drill Sergeant School from

January 3, 2018 until March 7, 2018, it is impossible for her to have both surgeries before the March 23rd deadline. Id.

Plaintiff Stone has a near-final treatment plan that calls for two surgeries, needing only a final stamp of approval, which is not in doubt. Suppl. Decl. Stone, ECF No. 66-13. The plan calls for the first of the surgeries in April 2018. Hr'g Tr. 63:15-17. Although Stone is trying to move the first surgery up to February in an attempt to meet the deadline, it seems unlikely, and the second surgery still needs to be scheduled. Id. at 18-22, Suppl. Decl. Stone, ECF No. 66-13.

Unlike the first plaintiff in Doe 1, Stone and Cole are highly unlikely to complete their medically-necessary surgeries before the effective date of the Directive. Unlike the second plaintiff in Doe 1, there is no lack of certainty regarding when transition treatment will begin for Stone and Cole since treatment has already begun, and Stone and Cole's surgeries are endangered by the Directive's deadline.

Plaintiffs also seek to assert a statutory claim in support of their challenge to the Directive. Am. Compl. ¶¶ 163–169, ECF No. 39.[15] However, the Court does not find the Amended Complaint

[15] Pursuant to 10 U.S.C. § 1074(a), active duty and reserve members of the United States armed services are entitled to medical and dental care in military treatment facilities. Plaintiffs claim that medically-necessary surgery indicated for the treatment of a gender dysphoria diagnosis is "medical care"

to present factual allegations sufficient to present a plausible statutory claim.

Defendants argue that the exception in the Directive will "cover" the Plaintiffs who will not have completed all of their approved and medically-required sex-reassignment surgeries by the effective date. Section 2(b) directs the Secretaries to "halt all use of DoD or DHS resources to fund sex reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex." President's Mem. § 2(b), ECF No. 40-21 (emphasis added). Defendants assert that because "Plaintiffs have in fact started a course of treatment to reassign their sex, and have transition plans either submitted or already in place, the exception may in fact apply to them." Defs.' Reply 9, ECF No. 77 (emphasis added). At the hearing, however, Defendants' counsel could not commit that the exception would apply to Plaintiffs. Hr'g Tr. 18:22-19:17, 20:11-19.

Plaintiffs contend that the exception seems to refer to "situations in which complications arise from surgery performed

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that is covered by the statutory right under § 1074(a)(1). Am. Compl. ¶ 165, ECF No. 39. As a result, Plaintiffs allege that the Directive will cause them to imminently suffer a violation of a statutory right. Id. at ¶¶ 165, 167.

before March 23." Pls.' Opp'n 12, ECF No. 66. Plaintiffs add that it is not clear that "any service member with a medical need for surgery will receive that surgery—even if he or she received no surgical treatment before March 23." Id. Plaintiffs argue that if the exception were to be interpreted under the broad terms proposed by Defendants, the "exception" would essentially nullify the Directive and contravene President Trump's premise about the cost of surgical care, adding that Defendants "may not evade judicial review by advancing (or, in this case, weakly suggesting) an interpretation of the challenged action that both is implausible and would fatally undercut the President's announced policy." Id. At the hearing, Plaintiffs added that "the Government, as far as we're aware, is not scheduling anything for after March 22nd." Hr'g Tr. 28:17-19; 29:8-9.

The Court finds that it is at the very least plausible that the exception would not apply to Stone and Cole's scheduled post-March-23rd surgeries. That conclusion is sufficient at this juncture to raise Plaintiffs' right to relief above the speculative and to the plausible level.

Accordingly, the Court finds that Plaintiffs have met their burden to demonstrate standing to challenge the Sex Reassignment Surgery Directive.

3. Ripe for Review

Defendants assert that the Court is being asked to prematurely judge the constitutionality of a future Government policy. The Defendants' argument based on alleged uncertainty of military policy is not supported by the record before the Court. The President has expressly directed the military to "return to the longstanding policy that was in place prior to June 2016" that "prohibit[s] openly transgender individuals from accession into the United States military and authorize[s] the discharge of such individuals." President's Mem. § 1, ECF No. 40-21. The President directed that the military stop using military resources to fund sex-reassignment surgical procedures for military personnel. Id. at § 2(b). The President ordered an implementation plan and set definite implementation dates. Id. at § 3. The only uncertainties are how, not if, the policy will be implemented and whether, in some future context, the President might be persuaded to change his mind and terminate the policies he is now putting into effect. Id. at § 1. The validity of the Directives in the President's Memorandum is fit for review.

Further, withholding review would impose hardship on the Plaintiffs. The hardship inquiry has largely been addressed in the standing discussion. Plaintiffs have demonstrated to the

Court's satisfaction that they are likely to suffer imminent harm as a result of the Directives in the President's Memorandum. They have further demonstrated that they are already suffering harmful consequences such as the cancellation and postponements of surgeries, the stigma of being set apart as inherently unfit, facing the prospect of discharge and inability to commission as an officer, the inability to move forward with long-term medical plans, and the threat to their prospects of obtaining long-term assignments. Waiting until after the Directives have been implemented to challenge their alleged violation of constitutional rights only subjects them to substantial risk of even greater harms.

Accordingly, the Court finds that this case is ripe for review.

B. Preliminary Injunction

1. Legal Standard

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." United States v. South Carolina, 720 F.3d 518, 524 (4th Cir. 2013) (quoting Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981)).

To obtain a preliminary injunction, a plaintiff must show

that:

1. It will likely succeed on the merits;

2. It is likely to suffer irreparable harm absent preliminary relief;

3. The balance of equities tips in its favor; and

4. An injunction is in the public interest.

Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008); Centro Tepeye v. Montgomery Cty., 722 F.3d 184, 188 (4th Cir. 2013)(en banc). The plaintiff has the burden of establishing that it meets the Winter factors. Dewhurst v. Century Aluminum Co., 649 F.3d 287, 293 (4th Cir. 2011).

Statements contained in an uncontroverted affidavit may be accepted as true. See, e.g., Elrod v. Burns, 427 U.S. 347, 350 n. 1 (1976) ("For purposes of our review . . . uncontroverted affidavits filed in support of the motion for a preliminary injunction are taken as true."). The weight to be accorded to affidavit testimony is within the discretion of the court, and statements based on belief rather than personal knowledge may be discounted. Federal Practice & Procedure § 2949 (collecting authority).

2. Likely Success on the Merits

Plaintiffs assert that the Directives in the President's Memorandum violate the equal protection and substantive due

process guarantees of the United States Constitution, as well as service members' statutory right to medical care. The Court finds that Plaintiffs are likely to succeed on their Equal Protection claim, as discussed below. Therefore, the Court finds it unnecessary to analyze separately the merits of the Substantive Due Process claim and the Violation of Statute claim.

The men and women who serve in the Armed Forces are "protected by the Fifth Amendment's Due Process Clause[,which] contains within it the prohibition against denying to any person the equal protection of the laws." United States v. Windsor, --- U.S. ----, 133 S. Ct. 2675, 2695 (2013); Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973). To succeed on an equal protection claim, Plaintiffs must demonstrate that they have been treated differently from others who are similarly situated and also show that the unequal treatment was the result of "intentional or purposeful discrimination." Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001). If Plaintiffs can make this showing, the court must then determine "whether the disparity in treatment can be justified under the requisite level of scrutiny." Id.

There is no doubt that the Directives in the President's Memorandum set apart transgender service members to be treated

differently from all other military service members. Defendants argue that deference is owed to military personnel decisions and to the military's policymaking process. The Court does not disagree. However, the Court takes note of the Amici of retired military officers and former national security officials, who state "this is not a case where deference is warranted, in light of the absence of any considered military policymaking process, and the sharp departure from decades of precedent on the approach of the U.S. military to major personnel policy changes." Amicus Br. 6, ECF No. 65-1. President Trump's tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest. Based on the circumstances surrounding the President's announcement and the departure from normal procedure, the Court agrees with the D.C. Court that there is sufficient support for Plaintiffs' claims that "the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy." Doe 1, 2017 WL 4873042, at *30.

The Court finds persuasive the D.C. Court's reasons for applying intermediate scrutiny: transgender individuals appear to satisfy the criteria of at least a quasi-suspect

classification, and the Directives are a form of discrimination on the basis of gender. Id. at *27-28. The Court also adopts the D.C. Court's reasoning in the application of intermediate scrutiny to the Directives and finds that the Plaintiffs herein are likely to succeed on their Equal Protection claim. See id. at *29-32.

Moreover, the Court finds that, based on the exhibits and declarations currently on the record, the Directives are unlikely to survive a rational review. The lack of any justification for the abrupt policy change, combined with the discriminatory impact to a group of our military service members who have served our country capably and honorably, cannot possibly constitute a legitimate governmental interest. See U. S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

3. Irreparable Harm

Plaintiffs must also make a clear showing that they are likely to be irreparably harmed absent preliminary relief. Winter, 555 U.S. at 20.

Plaintiffs' injuries as described above are the result of alleged violations of their rights to equal protection of the laws under the Fifth Amendment. In the context of an alleged violation of constitutional rights, a plaintiff's claimed

irreparable harm is inseparably linked to the likelihood of success on the merits. See Centro, 722 F.3d at 190.

Accordingly, the Court's finding that Plaintiffs are likely to succeed on the merits of their constitutional claim counsels in favor of finding that, in the absence of an injunction, they will suffer irreparable harm.

4. Balance of Equities and Public Interest

Courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Winter, 555 U.S. at 24. The Court agrees with the D.C. Court "that Plaintiffs have shown that the public interest and the balance of hardships weigh in favor of granting injunctive relief." Doe 1, 2017 WL 4873042, at *33. As stated:

> A bare invocation of "national defense" simply cannot defeat every motion for preliminary injunction that touches on the military. On the record before the Court, there is absolutely no support for the claim that the ongoing service of transgender people would have any negative effective on the military at all. In fact, there is considerable evidence that it is the discharge and banning of such individuals that would have such effects. . . . Moreover, the injunction that will be issued will in no way prevent the government from conducting studies or gathering advice or recommendations on transgender service.

Id.

Further, this Court has also received an Amici brief from 15 States, urging the Court to enjoin the Directives because a reinstatement of the pre-June 2016 policies will harm the Amici States and their residents. Amici Br. 13, ECF No. 63-1.

5. Summary

In summary, all the Winter factors weigh in favor of granting a preliminary injunction. The Court shall enjoin the enforcement of the Retention, Accession, and Sex Reassignment Surgical Directives pending the final resolution of this lawsuit.

C. Dismissal Under Rule 12(b)(6)

1. Legal Standard

A motion to dismiss filed pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. A complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)(citations omitted).

When evaluating a 12(b)(6) motion to dismiss, a plaintiff's well-pleaded allegations are accepted as true, and the complaint is viewed in the light most favorable to the plaintiff. However, conclusory statements or a "formulaic recitation of the elements of a cause of action" will not suffice. Id. A complaint must allege sufficient facts to "cross 'the line between possibility and plausibility of entitlement to relief.'" Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009)(quoting Twombly, 550 U.S. at 557).

2. Plaintiffs Present Plausible Claims

Defendants have moved to dismiss Plaintiffs' claims under Rule 12(b)(6). For the same reasons as the Court has concluded that Plaintiffs are likely to succeed on the merits of the Equal Protection claim, as discussed above, the Court holds that the allegations are adequate and present plausible claims. The Court shall address separately the plausibility of the Substantive Due Process claim and the Violation of Statute claim.

a. Substantive due process

The Supreme Court has stated that "the Due Process Clause was intended to prevent government officials from abusing

[their] power, or employing it as an instrument of oppression." Cty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)(citations omitted). Substantive due process claims deal with the reasonableness, or arbitrariness, of the governmental decision. Kerr v. Marshall Univ. Bd. of Governors, 824 F.3d 62, 80 (4th Cir. 2016). "Where executive action is concerned, a violation of an individual's substantive due process rights exists only when the official action is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." Id. (citations omitted).

What rises to the level of conscience-shocking?

> [N]egligently inflicted harm is categorically beneath the threshold of constitutional due process. It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level. Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property.
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> . . . .
>
> Rules of due process are not, however, subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive

> due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.

Lewis, 523 U.S. at 849, 850 (citations omitted).

Plaintiffs assert that President Trump's arbitrary decision, plainly inconsistent with all available data, to exclude men and women who are transgender from military service serves no legitimate interest and cannot be reconciled with the liberty and equality protected by the Constitution. Pls.' Mot. 28, ECF No. 40-2. Plaintiffs also argue that it is egregiously offensive to actively encourage transgender service members to reveal their status and serve openly, only to use the revelation to destroy those service members' careers. Id. at 29; see also Pls.' Reply 30, ECF No. 66 (referring to the maneuver as a "bait and switch").

"[T]he Fifth Amendment itself withdraws from Government the power to degrade or demean . . . ." Windsor, 133 S. Ct. at 2695. An unexpected announcement by the President and Commander in Chief of the United States via Twitter that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military" certainly can be considered shocking under the circumstances. Am. Compl. ¶¶ 94-95. According to news reports provided by Plaintiffs, the Secretary of Defense and other military

officials were surprised by the announcement. Id. ¶¶ 96-97, 104. The announcement also drew swift criticism from retired generals and admirals, senators, and more than 100 Members of Congress. Id. at ¶¶ 100-102. A capricious, arbitrary, and unqualified tweet of new policy does not trump the methodical and systematic review by military stakeholders qualified to understand the ramifications of policy changes.

Defendants argue that the President did not actually announce a policy decision, and it was rational for the President to order the military to study the issue further. The Court agrees that it could find an order for further study to be rational, but as already discussed, the Court finds that the President's Memorandum is not a request for a study but an order to implement the Directives contained therein.

Courts are reminded to be "reluctant to expand the concept of substantive due process" and "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [judges]." Hawkins v. Freeman, 195 F.3d 732, 738 (4th Cir. 1999). Proceeding with full recognition of that caution, the Court finds that Plaintiffs have stated a plausible claim sufficient to withstand a motion to dismiss.

b. Violation of Statute

Pursuant to 10 U.S.C. § 1074(a)(1), members of the United States armed services, including active duty and reserve members, are entitled to medical care in military treatment facilities. Plaintiffs allege that the President cannot override a duly-enacted statute by denying necessary medical care to a group of service members he happens to disfavor. Am. Compl. ¶ 169, ECF. No. 39. Plaintiffs also allege that the DoD's actions in implementing and enforcing the Sex Reassignment Surgery Directive are not in accordance with law under the Administrative Procedure Act, 5 U.S.C. § 706(2). Id.

Defendants do not dispute that the military has a statutory obligation to provide medically-necessary treatment, nor that surgical procedures are sometimes necessary to treat transgender individuals who have been diagnosed with gender dysphoria. Defendants argue, however, that the Interim Guidance, which is the operative policy at this point in time, is consistent with the statutory provision and that the exception to the surgical ban may mean that the statute will not be contravened after the Sex Reassignment Surgical Directive is implemented on March 23, 2018. Defendants assert that the statute does not create a private cause of action to sue the military in civilian court over the denial of medical treatment. Further Defendants assert

that the DoD has broad discretion to shape the scope of services provided at military facilities, citing 10 U.S.C. § 1074(a)(1) and § 1073(a)(b).

Plaintiff's allegations in support of their statutory claim are conclusory. They alleged that "DoD's actions in implementing and enforcing the ban are not in accordance with law under the Administrative Procedure Act, 5 U.S.C. § 706(2)." Am. Compl. ¶ 168. And that "Defendants, including the President, cannot act in contravention of a validly enacted statute. Their actions in establishing, implementing, and enforcing the ban on surgical care are ultra vires." Am. Compl. ¶ 169.

Perhaps Plaintiffs could assert an adequate and plausible statutory claim. They have not done so here. The Court shall dismiss the statutory claim without prejudice to the ability of Plaintiffs to seek to file an amendment that adequately asserts such a claim if they can do so.

IV. CONCLUSION

For the foregoing reasons:

1. Plaintiffs' Motion for Preliminary Injunction [ECF No. 40] is GRANTED.

2. By separate Order, the Court shall issue a Preliminary Injunction.

3. Defendants' Motion to Dismiss [ECF No. 52] is GRANTED IN PART and DENIED IN PART.

a) The Court hereby dismisses without prejudice Count III – Violation of 10 U.S.C. § 1074.

b) Counts I and II remain pending.

5. Plaintiff shall arrange a case planning conference to be held by December 15, 2017, to discuss the scheduling of further proceedings.

SO ORDERED, on Tuesday, November 21, 2017.

/s/
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al.	*	
Plaintiffs	*	
vs.	*	CIVIL ACTION NO. MJG-17-2459
DONALD J. TRUMP et al.	*	
Defendants	*	

* * * * * * * * *

PRELIMINARY INJUNCTION

For reasons stated in the Memorandum And Order Re: Motions issued herewith,

Defendants, Donald J. Trump, in his official capacity as President of the United States, James Mattis, in his official capacity as Secretary of Defense, Ryan McCarthy, in his official capacity as Acting Secretary of the U.S. Department of the Army, Richard Spencer, in his official capacity as Secretary of the U.S. Department of the Navy, and Heather Wilson in her official capacity as Secretary of the U.S. Department of the Air Force,

Are hereby enjoined and shall not enforce or implement the following policies and directives encompassed in President Trump's Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017, and entitled "Military Service by Transgender Individuals:"

> I am directing the Secretary of Defense, and the Secretary of Homeland Security with

> respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above.

Presidential Memorandum § 1(b).

> The Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, shall:
>
> (a) maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that I find convincing; and
> (b) halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.

Presidential Memorandum § 2.

This preliminary injunction shall remain in effect until such time, if ever, that this Preliminary Injunction is rescinded or modified by further Order of this Court.

Plaintiffs are not required to provide any security in compliance with Rule 65(c) of the Federal Rules of Civil Procedure.

Plaintiffs shall arrange a case planning conference to be held by December 15, 2017, to discuss the scheduling of further proceedings herein.

SO ORDERED, on Tuesday, November 21, 2017.

/s/
Marvin J. Garbis
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service on counsel for all parties in the district court has been accomplished by notice filed through the district court's CM/ECF system attaching a copy of this filing, as well as by e-mail to the following:

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In addition, I caused copies of the foregoing to be served on plaintiffs' lead attorneys, as designated by the district court docket, via mail:

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The district court has been provided a copy of this filing via notice filed on the district court docket, as well as by hand delivery.

s/ *Tara S. Morrissey*
TARA S. MORRISSEY